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Supreme Court of the United States

OCTOBER TERM, 1960

No. 100

TWENTIETH CENTURY-FOX FILM CORPORATION,

Petitioner,

—against—

PAUL C. TEAS, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDICES

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May 18, 1961

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
A. Factual Background of the Case	4
1. The parties and others interested in the case	4
2. The 1943 contracts	5
3. The 1952 Oil and Gas Lease between Fox Realty and Universal	6
B. The Proceedings Below	7
1. The nature of respondents' claims	7
2. The Motion to Dismiss	8
3. The Motion to Transfer the Action to the Southern District of California	9
4. The District Court's decision on the merits	9
5. The Court of Appeals' decision on the merits	9
REASONS FOR GRANTING THE WRIT	10
1. In deciding that the respondents' claimed interest in the proceeds from California oil and gas production was not an interest in real property, the Court of Appeals decided an important question of California law in a way in conflict with applicable California decisions	10

PAGE

2. The respondents' claimed interests under applicable California law are interests in real property. Therefore:

(a) Fox Realty, as owner of the real property and lessor, was an indispensable party 14

(b) The Texas District Court lacked jurisdiction to try a local action involving interests in California real property 16

3. By affirming the District Court's denial of petitioner's motion to transfer the action to the Southern District of California, the Court of Appeals sanctioned a radical departure from accepted standards of judicial procedure, the effect of which is to nullify 28 United States Code, Section 1404(a). The failure to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision 17

CONCLUSION 23

TABLE OF CASES CITED

Baker v. *Dale*, 123 F. Supp. 364 (W. D. Mo. 1954) .. 15

Boggess v. *Columbian Rope Co.*, 167 F. Supp. 854 (S. D. N. Y. 1958) 21

Boyce's Executors v. *Grundy*, 9 Pet. 275 (1835) 17

Calcote v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946), *cert. den.*, 329 U. S. 782 15

Callahan v. *Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935) 11, 22

Calza v. *American Airlines, Inc.*, 177 F. Supp. 238 (D. Minn. 1959) 21

Chase v. *Trimble*, 69 Cal. App. 2d 44, 158 P. 2d 247 (1945) 13

PAGE

Chicago, Rock Island & Pacific Railroad Co. v. *Igoe*, 220 F. 2d 299 (7th Cir. 1955), *cert. den.*, 350 U. S. 822 ..... 21, 23
Christian v. *Texas Gas & Power Corp.*, 14 F. R. D. 80 (N. D. Tex. 1952) 15
Consolidated Garage Co. v. *Chambers*, 111 Tex. 293, 231 S. W. 1072 (1921) 16
County of Los Angeles v. *Continental Corp.*, 113 Cal. App. 2d 207, 248 P. 2d 157 (1952) 11
Cressman v. *United Air Lines*, 158 F. Supp. 404 (S. D. N. Y. 1958) 21
Ellenwood v. *Marietta Chair Co.*, 158 U. S. 105 (1894) 17
Fannin v. *Jones*, 229 F. 2d 368 (6th Cir. 1956), *cert. den.*, 351 U. S. 938 22
Fidelity Mutual Life Ass'n v. *Harris*, 94 Tex. 25, 57 S. W. 635 (1900) 16
Fouke v. *Schenewerk*, 197 F. 2d 234 (5th Cir. 1952) .. 15
General Box Co. v. *United States*, 351 U. S. 159 (1956) 13
Guarantee Trust, etc. Co. v. *Delta & Pine Land Co.*, 104 Fed. 5 (5th Cir. 1900), *cert. den.*, 180 U. S. 636 (1901) 17
Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501 (1947) ... 18-19, 20, 22
Henderson v. *American Airlines*, 91 F. Supp. 191 (S. D. N. Y. 1950) 18
Hertz v. *Record Publishing Company of Erie*, 219 F. 2d 397 (3d Cir., 1955), *cert. den.*, 349 U. S. 912 15
Huddleston v. *Dwyer*, 322 U. S. 232 (1944) 13
International Shoe Co. v. *State of Washington*, 326 U. S. 310 (1950) 18
Keegan v. *Humble Oil & Refining Co.*, 155 F. 2d 971 (5th Cir. 1946) 15
Kroese v. *General Castings Corporation*, 179 F. 2d 760 (3d Cir., 1950), *cert. den.*, 339 U. S. 983 15
La Laguna Ranch Co. v. *Dodge*, 18 Cal. 2d 132, 114 P. 2d 351 (1941) 13

PAGE

Lemon v. *Druffel*, 253 F. 2d 680 (6th Cir., 1958), *cert. den.*, 358 U. S. 821 19

Livingston v. *Jefferson*, 15 Fed. Cas. 660, No. 8411 (C. C. D. Va. 1811) 17

McGee v. *International Life Ins. Co.*, 355 U. S. 220 (1957) 18

Morgan v. *Illinois Central Railroad Co.*, 161 F. Supp. 119 (S. D. Tex. 1958) ..... 2'

Norwood v. *Kirkpatrick*, 349 U. S. 29 (1955) 19

Peyser v. *General Motors Corp.*, 158 F. Supp. 526 (S. D. N. Y. 1958) 22

Propper v. *Clark*, 337 U. S. 472 (1949) 13

Recovery Oil Co. v. *Van Acker*, 79 Cal. App. 2d 639, 180 P. 2d 436 (1947) 12

Recovery Oil v. *Van Acker*, 96 Cal. App. 2d 909, 216 P. 2d 483 (1950) 12

Ro[illegible]nson v. *Seatex Oil Co.*, 57 F. Supp. 581 (N. D. Tex. 1944) 17

Schiffman v. *Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937) 13

Sims v. *United States*, 369 U. S. 108 (1959) 13

Southern Railway Co. v. *Madden*, 235 F. 2d 198 (4th Cir., 1956), *cert. den.*, 352 U. S. 953 23

State of Washington v. *United States*, 87 F. 2d 421 (9th Cir. 1936) 15

Steele v. *General Mills*, 329 U. S. 433 (1947) 13

Strawbridge v. *Curtiss*, 3 Cr. 267, 2 L. Ed. 435 (1806) 4

Taylor v. *Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959) 13

Texas Co. v. *Daugherty*, 107 Tex. 226, 176 S. W. 717 (1915) 22

Toledo Soc. for Crippled Children v. *Hickok*, 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. den.*, 347 U. S. 936 (1954) 16

PAGE

Torres v. *Steamship Rosario*, 125 F. Supp. 496 (S. D. N. Y. 1954), *mandamus den. sub. nom.*, *Torres* v. *Walsh*, 221 F. 2d 319 (4th Cir. 1955), *cert. den.*, 350 U. S. 836 18

Whelan v. *Placid Oil Co.*, 198 F. 2d 39 (5th Cir. 1952) 15

OTHER AUTHORITIES CITED

---

28 United States Code § 1332(c) 4

28 United States Code § 1391 17-18

28 United States Code § 1392(b) 16-17

28 United States Code § 1393 17

28 United States Code § 1404(a) 3, 17, 18

Rule 19 of the Federal Rules of Civil Procedure 15

Annual Report of the Director of the Administrative Office of the United States Courts, 1958, pp. 179, 181 22

Note, "Local Actions in the Federal Courts," 70 Harv. L. Rev. 708 (1957) 17

Restatement, Conflict of Laws § 613 16

Restatement of Judgments § 93 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioner,

vs.

PAUL C. TEAS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Twentieth Century-Fox Film Corporation, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that portion of a judgment affirming the judgment of the United States District Court for the Northern District of Texas in favor of respondents. That portion of the judgment of the Court of Appeals reversing a portion of the judgment of the District Court is not herein sought to be reviewed.

OPINIONS BELOW

1. The opinion of the Court of Appeals is reported in 286 F. 2d 373. The opinion is annexed hereto in Appendix A to this petition.

2. The opinion of the District Court upon the merits is reported in 178 F. Supp. 742. Its opinion denying the petitioner's motion to dismiss and its later opinion denying petitioner's motion to transfer the action to the Southern District of California under 28 United States Code, section 1404(a) are not reported. The opinions of the District Court are annexed hereto in Appendices B, C and D, respectively, to this petition.

JURISDICTION

The judgment sought to be reviewed was entered on January 23, 1961. A timely petition for rehearing was filed by the petitioner on February 10, 1961, and was denied on February 21, 1961. The judgment is annexed hereto as Appendix E to this petition. The order denying rehearing is annexed hereto as Exhibit F.

The jurisdiction of this Court is invoked under 28 United States Code, section 1254(1), on the grounds that the Court of Appeals has (1) decided important questions of state law in a way not in accord with the applicable law of California and (2) has sanctioned such a departure by a lower court from the accepted and usual course of judicial procedure as to conflict with applicable law and to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. In deciding that the respondents' claimed interest in the proceeds from California oil and gas production was not an interest in real property, did the Court of Appeals decide an important question of California law in a way in conflict with applicable California decisions?

2. If so, two subsidiary questions are presented:

(a) Was Fox Realty Corporation of California (herein referred to as "Fox Realty"), as owner of the real property and lessor, an indispensable party to the action, and

(b) did the Texas District Court have jurisdiction to try a local action involving interests in California real property?

3. In an action brought principally by California citizens in a federal court in Texas upon a contract, made and to be performed in California, affecting real property in California, involving intricate questions of California law, in which most of the lay witnesses are residents of California and none of whom is a resident of Texas, and in which Texas has no relationship to the transaction from which the action stems, has the Court of Appeals, by affirming the denial of a motion to transfer, sanctioned a radical departure from accepted standards of judicial procedure, the effect of which is to nullify 28 United States Code, section 1404(a)?

STATUTES INVOLVED

The case is controlled principally by Rule 19 of the Federal Rules of Civil Procedure and by the decisional law of California. The principal statute involved is the Act of May 24, 1949, c. 139, § 81, 63 Stat. 101 (28 U. S. C. § 1404[a]):

> "For the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

This action was commenced by respondents on April 9, 1958, in the United States District Court for the Northern District of Texas, said court having jurisdiction solely by virtue of diversity of citizenship then existing among the parties.*

The action involves the claims of respondents under certain contracts made in 1943 by the Janss Investment Corporation (herein referred to as "Janss Investment") and Fox Hills Realty Company (herein referred to as "Fox Hills"), on the one hand (said corporations being the purported predecessors of respondents), and petitioner and certain of its wholly owned subsidiaries. The asserted claim is to a portion of the proceeds derived from the production of oil and gas on certain real property located in Los Angeles, California.

A. Factual Background of the Case.

1. The parties and others interested in the case.

All of the respondents are said to be successors in interest of Janss Investment and Fox Hills with respect to the rights asserted in the action. The plaintiffs who are residents of California (the Janss family) together have over 75% of the total claim (R. 212).

Janss Investment is a Delaware corporation entirely owned by members of the Janss family, all of whom are

*The action was commenced shortly before the passage of the act of July 25, 1958, 72 Stat. 415 (28 U. S. C. § 1332[c]), making a corporation a citizen both of the state of its incorporation and of the state in which its principal place of business is located. Petitioner is a Delaware corporation with its principal place of business located in the State of New York. Since two of the respondents are citizens of New York, it is apparent that complete diversity of citizenship would have been defeated under the provisions of section 1332(c). See *Strawbridge* v. *Curtiss*, 3 Cr. 267, 2 L. Ed. 435 (1806).

voluntary plaintiffs. Janss Investment owned the majority of the stock of Fox Hills, formerly a California corporation and now dissolved (R. 415, 422, 605-6). Neither Janss Investment nor Fox Hills is a party to this action.

Petitioner is a Delaware corporation, with its principal place of business located in the State of New York. It is engaged in the production and distribution of motion pictures.

Fox Realty is a California corporation, which is wholly owned by petitioner. It owned various real properties, including the motion picture studio property involved in this case. It is also the lessor under the oil and gas lease involved in this case (R. 1800). Fox Realty is not a party to this action, although petitioner contends that it is indispensable to the maintenance of the action.

Universal Consolidated Oil Company (hereinafter referred to as "Universal") is a California corporation engaged in the production of oil and gas. It is the lessee under the oil and gas lease involved in this case (R. 1800). It is not a party to this action.

2. The 1943 contracts.

The real property affected by this action is located in Los Angeles, California, adjoining the city of Beverly Hills, California, and consists of approximately 286 acres. It was acquired in three separate transactions. A predecessor of petitioner acquired approximately 99 acres of said property from Janss Investment in 1924 for a cash consideration of $300,000 (P. Ex. 1, R. 1694). The deed recited a restriction which prohibited the drilling of any oil or gas well on the property. In 1936 a subsidiary of petitioner purchased from Fox Hills an additional portion of said property totaling approximately 98 acres for a cash consideration of approximately $540,000 (P. Exs. 4 and 6, R. 1698, 1701). The 1936 deeds contained similar

prohibitions against the drilling of oil and gas wells on the property.

The remainder of the studio property (approximately 89 acres), was acquired by Fox Realty in 1943 from Fox Hills. The 1943 transaction was evidenced by two contracts. Insofar as pertinent here, these contracts provided that Fox Realty would acquire the remaining 89 acres and the former drilling restrictions on the parcels previously acquired would be modified or eliminated. As consideration therefor, Fox Realty and petitioner agreed to pay the sum of $491,419.50 and, in addition:

> "* * * an amount equivalent to eight and one-third per cent (8⅓%) of the proceeds of all oil, gas, other hydrocarbons and other associated substances, produced and saved from wells bottomed under [the property] * * * without deducting for charges of any kind whatsoever * * * and * * * an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease for the extraction of oil, gas, other hydrocarbons and other associated substances from wells bottomed under [the property] * * *." (P. Ex. 15, R. 1737-8; P. Ex. 16, R. 1756-7).

The foregoing provision and its interpretation control the merits of the action.

3. The 1952 Oil and Gas Lease between Fox Realty and Universal.

An oil and gas lease was entered into as of March 21, 1952, between Universal and Fox Realty (P. Ex. 65, R. 1800). Under the terms of the lease, Universal agreed to pay to Janss Investment and Fox Hills amounts equiva-

lent to 8⅓% of the proceeds from all hydrocarbons extracted from the 280 acre studio property. Said 8⅓% was called the "Janss share" in the lease. Fox Realty reserved a basic royalty of 11⅔% for itself. Fox Realty also reserved a 50% "variable participating royalty", which interest constituted 50% of the net profits to be realized by Universal under the lease, determined in accordance with a formula contained in the lease. The lease contained no provision for the payment of "bonus" or "rentals".

Oil was discovered in February, 1954. Sustained production commenced later and royalties have accrued during each month since January, 1956. The 8⅓% "Janss share" has been continuously paid by Universal to respondents and is not involved in the action (D. Ex. 112). At the time of the trial, no variable participating royalty payments had yet become due (D. Ex. 111).

B. The Proceedings Below.

1. The nature of respondents' claims.

Respondents claimed in their Second Amended Complaint (upon which the case was tried) that, under the terms of the 1943 contracts, all consideration provided in the 1952 Universal lease was to be shared equally between Fox Realty and respondents. The basis of this claim was in the alternative: (1) that all lease consideration in excess of a "basic" 16⅔% royalty constituted "bonus" or "land rentals" paid as consideration for making and entering into an oil and gas lease, of which respondents were entitled to one-half; (2) if the contracts did not mean, as a matter of law, what respondents claimed, then the contracts were ambiguous and it was the intention of the parties to provide for an equal sharing of all lease consideration.

2. The Motion to Dismiss.

Prior to filing its answer to the original complaint, petitioner moved to dismiss the action on several grounds. First, petitioner argued that the action involved a claimed interest in California real property, the owner of which—Fox Realty—was an indispensable party. The joinder of Fox Realty would have destroyed jurisdiction because Fox Realty is a California corporation and most of the respondents are also California citizens. Second, petitioner argued that the action was a "local" action and that only a court sitting in California could adjudicate respondents' purported interest in the California real property (R. 57-8). The District Court denied the motion (Appendix, p. 33a-38a), although it acknowledged that the motion would have to be granted if the action indeed involved a claim to California real property (Appendix, p. 36a).

In subsequently adopted findings and conclusions, the court determined that "this is not a suit for California land and does not involve title to real property or any interest therein in that state, but is instead a suit on a personal covenant made by defendant to pay money" (Finding of Fact No. 2, R. 180; Conclusion of Law No. 5, R. 81). At the trial, petitioner renewed its motion to dismiss at the close of plaintiffs' evidence (R. 1108-71) and it was again denied (R. 1173).

The Court of Appeals affirmed the District Court's denial of the motion to dismiss on the ground that petitioner "was at no time in the chain of title" to any of the real property rights referred to in the 1943 contracts and that its sole interest in said contracts was due to a personal covenant to pay money (Appendix, p. 14a). The Court of Appeals held that "the action is not one dealing with an interest in realty." (Appendix, p. 13a).

3. The Motion to Transfer the Action to the Southern District of California.

Following the denial of the motion to dismiss, petitioner moved to transfer the action to the United States District Court for the Southern District of California on the grounds of convenience of the parties and witnesses and in the interest of justice, pursuant to 28 United States Code § 1404(a). Respondents resisted the motion principally on the ground that the matter could be brought to trial more rapidly in the Northern District of Texas and that few witnesses would be needed at the trial. The District Court denied the motion (Appendix, p. 39a-41a). The Court of Appeals affirmed on the ground that, since the trial court conducted a full hearing on the motion and apparently gave consideration to the convenience of the parties and the witnesses, it did not abuse its discretion (Appendix, p. 15a).

4. The District Court's decision on the merits.

The judgment of the District Court gave full effect to respondents' claims, awarding them one-half of the variable participating royalty, and one-half of the so-called "3⅓% royalty."*

5. The Court of Appeals' decision on the merits.

The Court of Appeals reversed the District Court with respect to its award to respondents of one-half of the so-called 3⅓% royalty. It held that all consideration beyond the "usual" royalty was not necessarily "bonus" as a matter of law, and that the 3⅓% royalty was "royalty" and not "bonus". The Court of Appeals affirmed the District

*The Universal lease provided for a basic 20% royalty. The difference between this and 16⅔%, which respondents claim was the "usual" or "standard" royalty in California, is the "3⅓% royalty". Respondents claimed one-half of the 3⅓% royalty or, in other words, that the 20% was to be divided equally.

Court's award to respondents of one-half of the variable participating royalty, holding that a net profits interest is "bonus" in which respondents are entitled to share equally.

REASONS FOR GRANTING THE WRIT

1. In deciding that the respondents' claimed interest in the proceeds from California oil and gas production was not an interest in real property, the Court of Appeals decided an important question of California law in a way in conflict with applicable California decisions.

The Court of Appeals held that the action does not involve interests in real property. This was a most important consideration since, as the Court of Appeals stated, two contentions were resolved by this single determination (Appendix, p. 13a). First, if the action involved interests in real property, then Fox Realty, the owner of the property, was an indispensable party. Second, if the action involved interests in real property, then the action was local rather than transitory and only a California court at the situs of the realty had jurisdiction. The Court of Appeals held that, as against the petitioner, the suit did not involve real property because petitioner was not in the chain of title to any of the property interests referred to in the 1943 contracts. Petitioner's role was found to be solely that of a promisor of a personal covenant to pay money.

The analysis of the court misses the point. We will assume that as against petitioner the suit sounds in contract. The transcendent fact is, however, as we will show, that the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property. Consequently, any determination of the contract rights of respondents, regardless of against whom they are asserted, necessarily adjudicates the

magnitude of the rights of the owner of the real property —Fox Realty. The pertinent inquiry is not to a characterization of the nature of petitioner's interest in the suit but rather to the nature of the respondents' interests and the necessary impact of the suit upon the real property rights of Fox Realty. That inquiry, we say, is an inquiry into California law. There is not a word in the Court of Appeals' decision analyzing the controlling California cases which unmistakably treat the interests claimed by the respondents as interests in real property.*

The California law is clear. In *Callahan* v. *Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935), California adopted the non-ownership or qualified ownership theory with respect to oil and gas rights and specifically rejected the "ownership in place" philosophy. Though repudiating the suggestion that the landowner owns the minerals in place underlying the surface of his property, the court held that the landowner's assignee of a fractional portion of the oil, gas, etc. produced and saved from the land owned an interest in real property. That interest was described as "an interest or estate in real property in the nature of an incorporeal hereditament." (43 P. 2d at p. 792). The interest of a lessee under an oil and gas lease was described as "an interest or estate in real property in the nature of a profit *a prendre*, which is an incorporeal hereditament." (Ibid.)

In *County of Los Angeles* v. *Continental Corp.*, 113 Cal. App. 2d 207, 248 P. 2d 157 (1952), the court held that a "drilling and operating agreement" was "substantially the equivalent" of an oil and gas lease and that de-

*It was not disputed in the Court of Appeals that California law governed in the construction of the contracts (Appendix, p. 6a). However, on the issue of the nature of the interests involved, the controlling California law was ignored.

fendant's interest in the agreement was taxable as an interest in real property. It did not matter that the interest was created in a contract rather than a lease, since "the designation which the parties to an agreement see fit to affix to it, is not controlling as to its legal effect" (248 P. 2d at p. 168). Thus, under California law, interests in oil and gas to be produced in the future, while not constituting absolute ownership of the oil and gas in place, do represent incorporeal interests in real property.

The important question in this case was whether, under the 1943 contracts, respondents' alleged predecessors acquired an interest in oil and gas. If so, those interests are incorporeal interests in real property. California courts have held that contracts such as the 1943 contracts do create incorporeal real property interests. *Recovery Oil Co.* v. *Van Acker,* 79 Cal. App. 2d 639, 180 P. 2d 436 (1947), was an action by a lessee to quiet title. Defendant was the assignee of "the proceeds from fifteen per cent (15%) of the oil, gas and other hydrocarbon substances" produced from the premises. The trial court quieted plaintiff's title on alternative grounds, one of which was that the assignments—which referred to "proceeds" from oil and gas production and not to a specified portion of oil and gas as such—did not create interests in the real property but constituted merely a personal covenant to pay money out of a specified fund (which was essentially the holding of the court below in the instant case). The California District Court of Appeals reversed. It held that it made no difference if the instrument referred to "proceeds" rather than to oil and gas as such. In a subsequent appeal in the case, the same court characterized the assignee's interest as "an interest in real property" and held it be "vested as an estate." *Recovery Oil* v. *Van Acker,* 96 Cal. App. 2d 909, 216 P. 2d 483, 485 (1950). To the same effect see

Schiffman v. *Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081, 1083 (1937), and *Taylor* v. *Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959). See also *Chase* v. *Trimble*, 69 Cal. App. 2d 44, 158 P. 2d 247 (1945) ("a sum equal to one-eighth of the market price of all oil produced") and *La Laguna Ranch Co.* v. *Dodge*, 18 Cal. 2d 132, 114 P. 2d 351, 355 (1941): "the purpose and scope of all such royalty interests," however created, "are so similar that all should be considered equally to be incorporeal interests in real property * * *."

There can be no question that under California law, a contract to pay a fractional portion of the proceeds of oil and gas production creates in the recipient an incorporeal interest in real property. That is precisely what the 1943 contracts provide and that is precisely their effect. In holding otherwise, the Court of Appeals decided an important question of California law in a way in conflict with applicable California decisions.*

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*We are, of course, mindful of this Court's practice to defer to the decisions of lower courts in construing state laws. *E.g.*, *General Box Co.* v. *United States*, 351 U. S. 159 (1956). But this practice, soundly based on the presumed familiarity of local judges with local law has no application where, as here, the lower Federal judges are not sitting in the jurisdiction whose substantive law is applicable. Neither the Court of Appeals nor the District Court has any special familiarity with the law of California. See, e.g., *Propper* v. *Clark*, 337 U. S. 472, 486-87 (1949) ("* * * we are hesitant to overrule decisions by federal judges skilled in the law of particular states"); *Steele* v. *General Mills*, 329 U. S. 433 (1947); *Sims* v. *United States*, 369 U. S. 108 (1959); *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

2. The respondents' claimed interests under applicable California law are interests in real property. Therefore:

(a) Fox Realty, as owner of the real property and lessor, was an indispensable party.

Neither the District Court nor the Court of Appeals disputed the fact that Fox Realty would be indispensable if the action involved real property.* Why then did the courts below fail to dismiss the action?

The District Court's refusal to do so was based on the erroneous assumption that the suit involved only a claim to money already derived from oil and gas production and thereby related to "severed" oil and gas proceeds, an interest in personalty like severed timber. This was a clearly erroneous assumption since the essence of the suit involves the proceeds of oil to be produced in the future. The heart of the case is repondents' claim to one-half of the variable participating royalty, none of which had accrued at the time the complaint was filed.

The Court of Appeals, as we have noted, concluded that the action did not involve real property since petitioner was not in the chain of title to any of the property interests referred to in the 1943 contracts and its role was therefore said to be merely that of a promisor on a personal covenant to pay money. The Court of Appeals missed the point. Regardless of whether or not the action against petitioner can be characterized as contractual in nature, the interest of Fox Realty necessarily arose since it was the fee owner of real property in which respondents claim an interest measured by the proceeds of oil and gas production. Plainly, a

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*" * * * the Court must decide if the declaration in the complaint calls for an adjudication of the title of real property. If it does, then the defendant's motion to dismiss should we think be sustained." (District Court opinion on motion to dismiss, Appendix, p. 36a).

"Both (parties) seem to agree that if it were such a suit touching on real property Fox Realty would be an indispensable party." (Court of Appeals Opinion, Appendix, p. 13a).

decree adjudicating the magnitude of one party's rights in real property necessarily affects correlatively the remaining real property rights of the other owners of the property whether they are parties or not.* Accordingly, Fox Realty's quantum of rights in the real property has been substantially and adversely affected by the decision awarding respondents an augmented share of the real property, based upon the construction of the 1943 contracts. See *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946), *cert. den.*, 329 U. S. 782; *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971 (5th Cir. 1946); *Fouke* v. *Schenewerk*, 197 F. 2d 234 (5th Cir. 1952); *Whelan* v. *Placid Oil Co.*, 198 F. 2d 39 (5th Cir. 1952); *State of Washington* v. *United States*, 87 F. 2d 421 (9th Cir. 1936).**

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*The "legal" rights of Fox Realty cannot be concluded of course since, as a non-party, it is not bound by the judgment. Restatement of Judgments § 93. But under Rule 19 of the Federal Rules of Civil Procedure the adverse effect contemplated is a "practical" rather than a legally conclusive effect. See *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971, 973 (5th Cir. 1946).

**Unquestionably, California law controls the question of the nature and extent of Fox Realty's interest. As the court put it in *Baker* v. *Dale*, 123 F. Supp. 364, 367 (W. D. Mo. 1954):

> "While the need to join 'indispensable parties' and the permissive right to join parties who are 'not indispensable,' in an action pending in the Federal Court, is procedural, and, hence, governed solely by rules of procedure applicable in the Federal Court, particularly Rule 19 of the Federal Rules of Civil Procedure * * * yet the matter of who constitute 'indispensable parties,' in a particular case, depends upon the nature of the right in suit and that, in turn, depends upon the substantive law of the state, and, therefore, it is necessary to examine the law of the state to determine the nature of the right and to whom it is given in order to determine who are 'indispensable parties' and who are not."

See *Krocse* v. *General Castings Corporation*, 179 F. 2d 760, 761-2 (3d Cir., 1950), *cert. den.*, 339 U. S. 983; *Hertz* v. *Record Publishing Company of Erie*, 219 F. 2d 307, 309-400 (3d Cir., 1955), *cert den.*, 349 U. S. 912; *Christian* v. *Texas Gas & Power Corp.*, 14 F. R. D. 80 (N. D. Tex. 1952).

The courts below were right in their conclusion that if the action did in fact involve interests in real property, Fox Realty was then an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. The courts below were wrong in failing to apply the clear-cut California law. Under California law the interests of respondents—and the interest of Fox Realty—are interests in real property.

(b) The Texas District Court lacked jurisdiction to try a local action involving interests in California real property.

The gravamen of this action is respondents' effort to establish the magnitude of their claims to the proceeds of oil and gas production from real property situated in California. The action therefore involves a determination of the quantum of respondents' rights which necessarily includes a determination of conflicting claims to the real property. The required determination makes this a "local" as distinguished from a "transitory" action. As such, it can be tried only by a court sitting where the real property is located. "No real action or action to recover possession of a tangible thing, whether land or chattel, can be maintained outside the state where the land or chattel is situated." Restatement, Conflict of Laws § 613.

The distinction between "local" and "transitory" actions is recognized by the Judicial Code. Section 1392 thereof provides that "any civil action, of a local nature, involving property located in different districts in the same state, may be brought in any of such districts." 28 U. S. C.

The Texas conflicts law holds that the law of the place of execution and performance is determinative of contract rights, e.g., *Consolidated Garage Co.* v. *Chambers*, 111 Tex. 293, 231 S. W. 1072, 1073 (1921); *Fidelity Mutual Life Ass'n* v. *Harris*, 94 Tex. 25, 57 S. W. 635 (1900), and that the law of the situs governs interests in real property, *e.g.*, *Toledo Soc. for Crippled Children* v. *Hickok*, 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. den.*, 347 U. S. 936 (1954).

§ 1392(b); *cf.* 28 U. S. C. § 1393. The leading case is *Livingston* v. *Jefferson*, 15 Fed. Cas. 660, No. 8411 (C. C. D. Va. 1811), in which Chief Justice Marshall participated while on circuit. This was a suit brought in the Circuit Court of Virginia against Thomas Jefferson for trespass to land located in the territory of Orleans (New Orleans). The court held that the common law distinction between local and transitory actions limited the jurisdiction of the federal courts and dismissed the action on the ground that the court sitting in Virginia could not try trespass and title to property located elsewhere. *Livingston* v. *Jefferson* thus limits the jurisdiction of the federal courts. See generally Note, "Local Actions in the Federal Courts," 70 Harv. L. Rev. 708 (1957); see *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105 (1894); *Guarantee Trust, etc. Co.* v. *Delta & Pine Land Co.*, 104 Fed. 5, 9, 12 (5th Cir. 1900), *cert. den.*, 180 U. S. 636 (1901); *Boyce's Executors* v. *Grundy*, 9 Pet. 275, 289 (1835); *Robinson* v. *Seatex Oil Co.*, 57 F. Supp. 581, 582 (N. D. Tex. 1944).

Since the affected real property in this case is located in California, a California court and *only* a California court, would have jurisdiction. Accordingly, the District Court was without jurisdiction.

3. By affirming the District Court's denial of petitioner's motion to transfer the action to the Southern District of California, the Court of Appeals sanctioned a radical departure from accepted standards of judicial procedure, the effect of which is to nullify 28 United States Code, Section 1404(a). The failure to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision.

The generous provisions of the general venue section of the Judicial Code (28 U. S. C. § 1391), which properly assure plaintiffs a forum in which to sue corporate defen-

dants, subject such defendants to suit in any district in which they "do business." The breadth of the "doing business" concept is such (see *e.g., International Shoe Co.* v. *State of Washington*, 326 U. S. 310 [1950]; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 [1957]) that national corporations are exposed to suit in forums with which they, and the transaction out of which the action arises, may have only minimum contacts.* The invitation to rampant forum shopping is apparent; the federal antidote is 28 U. S. C. § 1404(a). *Torres* v. *Steamship Rosario*, 125 F. Supp. 496, 497 (S. D. N. Y. 1954), *mandamus den. sub. nom. Torres* v. *Walsh*, 221 F. 2d 319 (4th Cir. 1955), *cert. den.*, 350 U. S. 836; *Henderson* v. *American Airlines*, 91 F. Supp. 191, 192 (S. D. N. Y. 1950).

Section 1404(a)—the principal device available to combat forum shopping—requires a vigorous application to accomplish its evident purpose. It does not confer unreviewable discretion upon the district courts to proceed with whim and caprice in its application. Rather it confers a reasoned and controlled discretion to be exercised in accordance with recognized standards.

The classic catalogue of the principal factors to be considered is contained in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947). Holding that *forum non conveniens* is operative in the federal courts because the liberal federal venue policy "may admit those who seek not simply justice but perhaps justice blended with some harassment" (330 U. S. at 507), this Court identified the private interests of the litigants and the public interest in fair judicial administration as the rubrics controlling its application. The major

*Petitioner, for example, distributes motion pictures in Texas, as in all other states. It maintains a film exchange in that state. These are the only contacts of petitioner with Texas—sufficient to be sure for purposes of suing petitioner on any transitory cause of action arising anywhere.

factors under the "private interest" are: (1) ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) cost of obtaining willing witnesses; (4) possibility of viewing premises where appropriate; (5) other practical factors affecting ease, expedience and expense of trial; and (6) difficulties of enforcing judgment. Under the "public interest," the factors are: (1) Congestion of calendars caused by trying cases away from the places where the controversy originates; (2) "Jury duty * * * ought not to be imposed upon the people of a community which has no relation to the litigation" (330 U. S. at 508); (3) "There is a local interest in having localized controversies decided at home" (330 U. S. at 509); (4) "There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." (*Ibid.*)

Gulf Oil preceded Section 1404(a). The remedy under *Gulf Oil* for the inconvenient forum was dismissal, with the possible consequence of defeating the plaintiff's action because of the running of the statute of limitations. Because of the harshness of the remedy, this Court, in *Gulf Oil*, said that the balance of convenience must be strongly in favor of the defendant to disturb plaintiff's choice of forum (330 U. S. at 508). Section 1404(a) converted the remedy from dismissal to transfer, thereby obviating the potential harshness inhering in the doctrine. Accordingly, this Court has held that Section 1404(a) broadens the discretion of the district courts in favor of granting the motion for transfer. In other words, a lesser showing of inconvenience is now required. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32 (1955). A major consequence is that the plaintiff's choice of forum is no longer a dominant factor to be considered. *Lemon* v. *Druffel*, 253 F. 2d 680 (6th Cir. 1958), *cert. den.*, 358 U. S. 821.

It is hard to imagine a case more demanding of the protection of Section 1404(a) than the instant case. On substantially every ground specified in *Gulf Oil*, this case should have been transferred to California. All of the operative facts out of which the action arises took place in California. Only one of the respondents is a citizen of Texas and his small interest in the case was acquired contemporaneously with the filing of the action. The owners of the principal shares of the claim—and the persons familiar with and involved in the controversy—are citizens and residents of California. The 1943 contracts were negotiated, made and performable in California. The persons familiar with the negotiations of the contracts are residents of California and New York. The persons familiar with the Universal lease are residents of California. No lay witnesses were residents of Texas. The compulsory process of the Texas court could not reach a single lay witness who testified at the trial, not to mention those who did not testify. Important evidence had to be offered by depositions. Documentary evidence was voluminous and was located in California and New York. None of it was in Texas. The real property involved is in California. The case involves difficult questions of California law, with which the Texas courts have no special familiarity. In summary, the dispute is a local California dispute having nothing whatever to do with Texas. Texas was no more appropriate a forum than Vermont, Idaho or Florida. Texas was "chosen" out of considerations which involved nothing more than egregious forum shopping.

The Court of Appeals upheld the District Court on the ground that the trial judge gave consideration to the various factors by holding a hearing—thereby properly exercising the discretion afforded by Section 1404(a). A reading of the District Court's opinion (Appendix, p. 39a-42a) belies the assumption of the Court of Appeals. The District Court denied the motion because (1) plaintiffs'

choice of forum should be respected; (2) Texas is "a pioneer in the oil business"; (3) testimony by deposition in a contract case is just as good as oral testimony; and (4) the time required to reach trial is less in the Northern District of Texas than in the Southern District of California. There is not a word about the controlling effect of California law, the fact that the case reflects a California controversy or the other factors enumerated in *Gulf Oil*. And each of the factors relied upon by the District Court is unsound as a matter of law.

Whatever deference is still paid to a plaintiff's choice of forum is applicable only where the plaintiff's choice is his own home forum. *E.g., Cressman* v. *United Air Lines*, 158 F. Supp. 404, 407 (S. D. N. Y. 1958); *Calva* v. *American Airlines, Inc*, 177 F. Supp. 238, 239 (D. Minn. 1959). Texas is not the home forum of any of the respondents, with the single exception of respondent Teas, to whom a small interest was assigned the day before the complaint was filed and who admitted he "was buying a speculative thing—an interest in a lawsuit". (Teas Deposition, p. 23). Moreover, where the forum has no local interest in the parties or subject matter, and none of the operative facts occurred within it, plaintiffs' choice is entitled to only "minimal" consideration. *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, 304 (7th Cir. 1955), *cert. den.*, 350 U. S. 822; *Morgan* v. *Illinois Central Railroad Co.* 161 F. Supp. 119, 120 (S. D. Tex. 1958); *Boggess* v. *Columbian Rope Co.* 167 F. Supp. 854, 857 (S. D. N. Y. 1958).

That Texas is a "pioneer" in the oil business is totally irrelevant. Indeed, if anything, the importance of oil and gas law in Texas is a reason for transferring the action to California, since the underlying nature of oil and gas interests in Texas is radically different from that prevailing in California. Texas recognizes oil and gas rights as

property "in place" (*e.g., Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717 [1915]), while California follows the non-ownership or qualified ownership theory. *E.g., Callahan* v. *Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935).

The assumption of the District Court that testimony by deposition "is just as desirable" (Appendix, p. 42a) as oral testimony contradicts this Court's recognition in *Gulf Oil* that trial by depositions creates "a condition not satisfactory to court, jury or most litigants." (330 U. S. at 511).

Finally, the District Court's resort to the comparative state of the calendars in the two districts makes determinative a factor "to which great weight is (never) assigned." *Peyser* v. *General Motors Corp.*, 158 F. Supp. 526 (S. D. N. Y. 1958). Where the nature of the case is such that an early trial is important, congestion of trial calendars may be given some weight. *E.g., Fannin* v. *Jones*, 229 F. 2d 368, 370 (6th Cir. 1956), *cert. den.*, 351 U. S. 938. But, here, the variable participating royalty had not even accrued when the action was commenced and tried. A few months difference in trial dates was not consequential.*

The Court of Appeals, in upholding the District Court, erroneously assumed that the holding of a hearing and "considering" the factors constituted an unreviewable exercise of discretion by the District Judge. Such a view, in effect, confers uncontrollable discretion on the lower federal courts which, as here, can lead to the erosion of the important protective policy represented by Section 1404(a). Where the facts in connection with the decision on transfer

*Moreover, the actual difference in relative calendar congestion was not significant. In the Northern District of Texas, the median lapse of time between filing and trial was 5½ months while in the Southern District of California it was 11 months. Annual Report of the Director of the Administrative Office of the United States Courts, 1958, pp. 179, 181. On a comparative basis with other districts, the calendars of each of these districts were relatively clear. Actually, 12 months elapsed between filing and trial—longer than the median in either district.

are undisputed, as here, the reviewing court must assure itself that the District Court gives proper weight to the various factors. The record here speaks eloquently that the District Court failed to exercise a reasoned discretion in accordance with the applicable standards. When that occurs, a denial of a motion to transfer should be reversed. *E.g., Southern Railway Co. v. Madden*, 235 F. 2d 198, 201 (4th Cir. 1956), *cert. den.*, 352 U. S. 953; *Chicago, Rock Island & Pacific Railroad Co. v. Igoe*, 220 F. 2d 299 (7th Cir. 1955) *cert. den.*, 350 U. S. 822.

The failure of the District Court to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision.

CONCLUSION

For the reasons advanced above the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 18, 1961

APPENDIX A

Opinion of the Court of Appeals (January 23, 1961)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a judgment of the District Court, sitting without a jury, permitting recovery of an amount measured by payments denominated "variable participating royalties" on the finding that such payments were in reality a bonus paid as consideration for the making of an oil and gas lease.

The facts essential to a decision of this case can be rather briefly stated, although they must be culled from a long and involved record and from nearly 600 pages of briefs.

In 1943, Fox Realty Company was a wholly owned subsidiary of the defendant, Twentieth Century. It was the owner of two tracts of land in Los Angeles County, California, which had been acquired, and had long been used, as a site for motion picture studios. It was also the owner of all minerals thereunder subject to restrictions in favor of its predecessors in title prohibiting the drilling for oil and gas. In April 1943, Fox Realty acquired a third tract in fee simple without restriction as to drilling, and without reservation of any interest in the minerals. The prior owner of the two tracts and the owner of the third tract were interrelated and were the predecessors in title to plaintiffs here. As a group, they will hereafter be called plaintiffs.

In the acquisition of the third tract Fox or Twentieth Century paid $491,419.50 for the 89.349 acres involved

and it and defendant Twentieth Century jointly and severally contracted with plaintiffs to pay the former owners of the two lots and to pay the owner of the third lot then being acquired with respect to each lot:[1]

> "* * * an amount equivalent to eight and one-third per cent (8⅓%) of the proceeds of all oil, gas, other hydrocarbons and other associated substances produced and saved from wells bottomed under [Lots 1, 2 and 3] without deducting for charges of any kind whatsoever, and * * * an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease for the extraction of oil, gas, other hydrocarbons and other associated substances from wells bottomed under said [Lots 1, 2 and 3] * * *."

Thereafter, in 1952 Fox entered into an oil and gas lease as lessor with Universal Consolidated Oil Company. That lease provided for the payment by Universal directly to Plaintiffs of the 8⅓% amount on all three lots. In addition, Fox received for itself a royalty of 11⅔% (together with the 8⅓% to be paid directly to plaintiffs this would, of course, amount to payment by Universal of a

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[1]The contract, without indicating the inter-company arrangements leading to it was between plaintiffs on the one hand and Twentieth Century and Fox on the other. It provided that the third lot and the releases on the other lot were to be conveyed to Fox in return for a promise, jointly and severally made, by Twentieth and Fox to pay the $491,419.50 and the 8⅓% and other items quoted in the text.

20% basic royalty) and it also received what was denominated a "variable participating royalty", consisting of one-half of Universal's net profits from the lease, as defined therein.

We defer consideration of questions of jurisdiction, including that relating to the parties, because the jurisdiction issue will be better understood after we analyze the nature of the contracts. The principal consideration on the merits presented by the suit is whether the full 20% royalties and the "variable participating royalties" were either bonus payments or land rentals. If so, the plaintiffs were entitled to one-half of these sums rather than an amount equal to only 8⅓% of production, which is all that they have received since the execution of the lease.

The respective contentions can be stated quite simply: Plaintiffs contend that the contract guaranteed them 8⅓% basic royalty if there was any oil or gas production and that in addition if Fox obtained anything more than 16⅔% royalties, all such excess represented either bonus or land rentals and they became entitled to one-half of them as well; in the alternative, they claimed that they were entitled to all the excess that would not fit into the recognized definition of royalty, in which case they were entitled to receive one-half of the "variable participating royalties", or net profits, if not also one-half of the 3⅓% of excess royalties.

The defendant contends that all the plaintiffs were entitled to receive beyond the 8⅓% was any payments that fit into the definition of either "bonus" or "land rental" and that the California jurisprudence excluded net profits and the 3⅓% excess royalties from either definition, and thus, plaintiffs were entitled to nothing more than the 8⅓% which they had been receiving.

Opinion of the Court of Appeals
(January 23, 1961)

The plaintiffs made a third contention which, in effect, is that in surrendering the restrictions on drilling as to the two lots and in conveying the fee simple without restrictions to the third in return for the 1943 agreements, there was imposed on Fox, and vicariously, on Twentieth Century, the quasi-fiduciary duty to make the best lease agreement it could for the joint protection of itself and of plaintiffs. This, plaintiffs say, required them to obtain as good a "bonus" as possible; it precluded the making of a lease that so divided the total fruits of the leasing as to give much greater benefits to Fox by simply avoiding the inclusion of anything called "bonus" but by including something equally valuable in the nature of added royalties or contingent income in a form of a participation in net operating income. The language of the contract so clearly distinguishes royalty from any other kind of benefits to be realized from a lease of the minerals, we conclude that it is clear that there could be no violation of the defendant's alleged duty to act in good faith if it was able, as happened here, to exact an additional amount clearly recognized to be royalties. The disposition we make of the case as to the remaining payments makes it unnecessary for us to determine whether the fiduciary or good faith contention should prevail as to the variable participating royalties.

Restating the issue, we must decide whether the excess of 3⅓% (20% over twice 8⅓%) and the one-half of the net profits of the operation are "bonus payments" or "land rentals," "distinguished from the term 'royalty' as the term 'royalties' is generally understood in connection with the construction thereof in oil and gas leases."

The trial court, after making extensive findings of fact, concluded that both categories of payments satisfied the

definition of "bonus" and decreed that the plaintiffs were entitled to participate fifty-fifty with defendant as to all payments from the Universal Consolidated Lease.

We consider the simple part of the question first. There can really be no serious doubt that the entire 11⅔% royalties received by Fox (in addition to the 8⅓% paid by lessee to plaintiffs direct) was "payment of oil and gas royalties as the term 'royalties' is generally understood and defined, etc.", except for one implausible and strained contention. That is, that at the time in question in California the customary *rate* of royalty was 16⅔%; therefore, the term "royalties, generally understood and defined in connection with the construction thereof in oil and gas leases" must mean that anything in excess of 16⅔% is excluded. To the contrary, we think the parenthetical part of the contract intends only to define the *quality* of a royalty and not the *quantity*. We think it clear as to royalties, in the accepted sense, the plaintiffs agreed to a figure of 8⅓%. Anything defendant was able to bargain for as royalties beyond that figure it was not obligated to share with plaintiffs. To this extent, therefore, the judgment of the trial court was in error.

Turning then to the second and more difficult issue: was the one-half of the net profits from the operation a bonus as distinguished from the payment of royalties? We conclude that on this issue the plaintiffs are correct in their contention, and to that very substantial extent we affirm what was decided by the trial court.

Much of the argument in the extensive briefs filed by the parties is devoted to the discussion of the degree to which it was proper for the trial court to hear evidence of the circumstances surrounding the execution of the 1943

contract and concerning the meaning in the trade of the several terms "bonus", "land rentals", and "royalty". Most courts, and this one is no exception, have had considerable difficulty in formulating any definitive rule that adequately covers that area of the law of evidence. The members of this Court are not, among themselves, always in agreement in the particular application of the generally accepted rules. See *Fidelity Fire Insurance Company* v. *Farm-Air Service*, 5 Cir. 255 F. 2d 658; *Gulf Atlantic Towing Corp.* v. *Dickerson*, 5 Cir. 271, F. 2d 542; and see discussion in footnote 14 of *U. S. Industries* v. *Camco, Inc.*, 5 Cir. 277, F. 2d 292, 295.

Whatever may be the proper rule respecting the introduction of external evidence to aid the court in construing a written contract, we do not need to concern ourselves with that problem here, because we think it plain that this contract, by its very terms, required reference to such external evidence. The only "bonus" or "land rentals" payments in which the plaintiffs are entitled to participate are such as are distinguished from royalties, and the parties agreed that in ascertaining what was meant by royalties they would ascertain what is understood and defined as royalties in the construction of such terms in oil and gas leases. When it became the duty of the trial court to make this ascertainment, it was required, we think, to obtain evidence from those familiar with the terms as used in the trade.

Appellant contends that rather than importing the use of external evidence, this language required the trial court to refer to California decided cases,[2] which it says define

[2]It is not disputed that California law governs in the construction of the contract.

"bonus", "land rentals", and "royalty" in legal terms that preclude a decision in favor of the appellants.

The appellees take the position, on the contrary, that this parenthetical clause of the contract does not refer the inquiry to decided cases, but rather to the understanding of the trade, and moreover they say that if the matter be referable to judicial decisions alone, there are no California decisions holding that the two categories of payments here are neither bonus or land rentals.

As we have already indicated, we conclude that there is no question here of varying the contract by parole evidence, because the contract itself makes the definition of the term "royalty" referable to understanding in the trade, and this is, of course, provable only by parole evidence.

While we conclude that this matter of definition is to be ascertained as a question of fact, based upon the understanding and definition of "royalty" in the construction of oil and gas leases in California, we feel it appropriate to discuss briefly the argument by appellant touching on the California jurisprudence dealing with the various definitions. The principal case cited by appellant in support of its contention is *Geller* v. *Smith*, 30 Calif. App. 485, 20 Pac. 2d 102, a case decided in 1933. The trial court in that case was concerned with a suit by a real estate agent under a contract which entitled the agent to any "bonus" received by his principal in executing a lease. The parties to the lease denominated part of a $2,000 cash payment, a "bonus" and $1,500 a "commission." The trial court held that the $1,500 was a bonus notwithstanding the parties called it a "commission." In doing so, the court said:

> "Apparently it all hinges on the meaning of the word, 'bonus'. I think the word 'bonus' has a legal

> meaning, but a certain term may have a significant meaning in a certain business and in a certain locality, and if it varies with the locality, it may be established by evidence. On the other hand, that expression may come to have a definite legal meaning. *My opinion is that the term 'bonus' as applied to an oil lease has come to have a definite meaning, to wit: a sum of money paid by the lessee to the lessor in consideration for the execution of a lease, as distinguished from the return or royalty reserved by the lessor to be paid by the lessee through the term of the lease."* (This emphasis is used by appellant to indicate what it particularly relies on.)

This statement was approved by the appellate court in affirming the judgment of the trial court.

It at once becomes apparent that in order to decide that the $1,500 involved in that case was a "bonus," as contracted for by the parties, it was not necessary for the court to announce a definition of "bonus" *as distinguished* from "royalty." There was no suggestion in that case that the $1,500 payment was a "royalty."

Thus, it must be recognized, that in approving this statement, the California Court of Appeals approved what was really dictum. In light of this analysis of *Geller* v. *Smith, supra,* we think the later opinion by the California Court of Appeals in *Stockton* v. *Weekes,* 51 Cal. App., 2d 447, 125 P. 2d 110, decided in 1941, is significant. In that case, the court said, "No fixed and unvarying meaning can be applied to the term 'bonus' without a construction of the particular lease in each case."

This apparently was the latest pronouncement of the California Appellate Court touching on the subject at the time the 1943 contract was executed. We think, therefore,

that even under these California decisions, the matter of what was meant by "bonus" and "royalty" in a contract phrased as was the one now before the court, had not been judicially determined, as having the meaning ascribed to them by appellant.

We think it clear that there is a dictionary meaning of the word "bonus" that would fully support the plaintiffs' claim, i.e., "something extra".[3] Thus, but for some special meaning in the trade that would make it a word of art, when the contract provided a royalty of 8⅓% and then provided for one-half of any bonus payments, other than royalties it could well be argued that bonus meant anything extra (outside of anything strictly known as royalties) received by the lessor.

Holding as we do, however, that this particular contract leaves it open to either party to establish that the net income payments meet its claimed definition of royalty or bonus, we turn now to the nature of the proof on which the District Court made its finding of fact.

The precise fact findings by the trial court that support the decision in favor of plaintiffs are:

> 19. A "net profits interest" such as was provided in the 1952 lease of Universal Consolidated Oil Company was not a royalty "as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases" either by common usage, Court definitions or according to the intention of the parties when these contracts are made in 1943.

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[3]Something given in addition to what is usual or strictly due to the recipient. Webster's New International Dictionary, 1936 edition.

24. The "net profits interest" such as was provided in the 1952 lease to Universal Consolidated Oil Company was a "bonus" under these 1943 contracts.

It can hardly be argued that there was a lack of substantial evidence to support these findings. The evidence fully warranted, if, indeed, it did not demand, a finding that royalty as generally understood and defined is (1) an interest in, or measured by (2) gross production, (3) bearing no part of the cost of development, operation or production and (4) continuing from the first production until the last barrel is produced from the property, however these characteristics may be grouped or expressed. The outstanding characteristic, as testified to, seems to be that as every barrel of oil is taken out, the royalty is paid, whether or not the lessee makes a profit.

Thus, it was only logical for the Court to find that the payments here called "variable participating royalty" which are in fact payments representing one-half the *net* profits after the deduction of all operating and development costs, are not payments of royalties as generally understood and defined. They lacked the characteristic of being paid out of every barrel of production and they became due only after all expenses have been met.

In view of the fact that the only kind of payments dealt with in the contract were royalty, bonus and land rental payments, and that the latter two were stated to be distinguished from the other by what the industry understood were the qualities attributed to royalty, a strong argument could be made that all fruits from any leasing were intended

to fall within one of these three terms. This is what appellant contends. We need not go that far as a matter of law for us to approve the action of the trial court because its findings gave effect to this contention based on the evidence before it.

The provision in the contract referring the meaning of royalty to external evidence to determine whether the payment of net profits was distinguishable from royalty makes it necessary to refer to external evidence to ascertain the understanding and definition of the contrasted terms bonus and land rentals. Such external evidence clearly supports the finding that the variable participating royalties are bonus payments. The record includes evidence that there was a general custom and usage in the area at the time of the execution of the contract with respect to the meaning and use of the term "bonus" and that the meaning was that "bonus" comprehended every consideration that the lessor received other than royalties; Again, the term "bonus" meant "any consideration in addition to the normal or basic royalties that was paid for a lease."

Moreover, as we read the cases cited by appellant to demonstrate its contention that bonus cannot include these variable participating royalties, we find that they do not really support this claim, even though we should recognize them as controlling. Even in the case of *Geller* v. *Smith*, quoted above, there the definition relied on by appellant is "a sum of money paid by lessee to the lessor in consideration for the execution of a lease, *as distinguished from the return of royalty reserved by the lessor through the term of the lease.*" Once we have approved a finding that the net profits cannot be considered as "royalty", then there is

nothing in this definition that would exclude from the definition of "bonus" payments made by the lessee to the lessor as net profit in consideration for the execution of the lease. There is nothing in the language used by the court in *Geller* v. *Smith* that the "sum of money" must be either cash or must be exactly ascertained in amount at the time the lessee obligates itself to make the payments.

So, too, the definitions urged on the Court by appellant as stated in *Griffith* v. *Taylor*, 156 Tex. 1, 291 SW 2d 673. In that case, the Supreme Court of Texas quoted the above language of *Geller* v. *Smith* defining bonus and also quoted from *Texas Company* v. *Fontenot*, 200 La. 753, 8 So. 2d 689, stating, "bonus meaning the cash consideration paid or agreed to be paid for the execution of the lease." We do not understand that any of these cases stands for the proposition that the term bonus is not broad enough to comprehend payments made to a lessor, the amount and method of measurement of which payments are fixed by a formula, so long as the formula is not that which constitutes a royalty. We find nothing in the *Elsinore Oil Co.* v. *Signal Oil & Gas Co.*, 3 Cal. App. 2d 570, 40 P. 2d 523, case in conflict with what is said here.

We conclude, therefore, on the merits, that this contract is to be construed as entitling the plaintiffs, in addition to the 8⅓% payments to be received directly from the lessee, to receive a sum equal to one-half of the amounts received and to be received by Fox and denominated in the lease contract "variable participating royalties."

Several other matters remain for consideration. The first of these, appellant's contention that the plaintiffs did not have title to the claims sued upon because of a failure

to comply with the provisions of the California Blue Sky Laws on assignment of securities we think too insubstantial to require extended comment. Substantially all of the assignments here involved were made to their stockholders upon the legal dissolution of the corporations. As to the others, we think the trial court properly held that valid title to the claims resided in the plaintiffs.

The next point is the combined issue of parties and jurisdiction. Appellant strongly urges that the District Court for the Northern District of Texas did not have jurisdiction over the case for two reasons: (1) It was a suit involving an interest in real property and was thus not a transitory action and only the district court of the situs of the realty had jurisdiction, and (2) Fox Realty Company, a California corporation, as the lessor under the lease here being construed, was an indispensable party to the action by reason of its being a suit over an interest in realty, and if Fox Realty Company were brought into the suit as a defendant diversity jurisdiction would be destroyed because there were several California plaintiffs.

These two contentions are resolved by a single consideration. Fox Realty Company is *not* an indispensable party *because* the action is not one dealing with an interest in realty.[4] We need not consider whether, if Fox Realty were being sued, such suit would deal with an interest in realty by reason of the fact that Fox was the lessor and its reservation of a royalty interest (at least as to 11⅓%, and

[4]Appellant pitches its claim on indispensability on the theory that this suit adjudicates rights in real property. Appellees answer that no such real property interests are decided. Both seem to agree that if it were such a suit touching on real property Fox Realty would be an indispensable party

possibly also the 8⅓% payment) amounted to an interest in realty.[5]

Here the defendant was at no time in the chain of title to any of the interests included within the 1943 agreement under which its obligation arose to make the several kinds of payments. As between itself and the plaintiffs, Twentieth Century merely promised that the payments would be made. As we have already discussed, conveyance of the releases and of the fee to the third tract of land was made to Fox on the promise of Fox and Twentieth Century *jointly* and *severally* to pay the consideration. Twentieth Century's obligation thus was strictly a personal obligation, which by its agreement it repeatedly denominated *joint* and *several*. Of course, under a joint and several obligation the obligee can sue either or both obligors. The privilege of suing one without joining the other is a substantial benefit to the obligee which we think cannot be frustrated by holding that the other several obligor must be joined as an indispensable party.

Whatever might be the situation if Twentieth Century's obligation to pay these items to the plaintiffs arose from its having an assignment or conveyance from Fox as a

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[5]This proposition, the appellant states, is supported by Commissioner v. Southwestern Exploration Co., 350 U.S. 308 (although all the Court held there was that there was sufficient *economic* interest in the minerals in place in the owners of adjacent lands needed for drilling purposes to entitle them to take depreciation for federal tax purposes on proceeds from leases of drilling rights). Callahan v. Martin, 3 Cal. 2d 110, 43 P. 2d 788; Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132, 114 P. 2d 351, 353; and County of Los Angeles v. Continental Corp., 113 Cal. App. 2d 207, 248 P. 2d 157.

Appellees counter principally by pointing to the language of the contract that is in terms of "amounts equivalent to, etc." and they cite In Re Broome's Estate, 166 Cal. App. 2d 488, 333 P. 2d 373.

predecessor of title, we do not here need to decide. Here Twentieth Century, so far as concerns any interest that Fox may have in real property, actually stands to one side and its liability to the plaintiff is to be construed solely on its contractual agreement to pay and not on any interrelationship between the parties flowing from a dealing with an interest in real property.

Next, we find no basis for holding that the finding by the trial court that there had been no waiver of rights claimed by the plaintiffs and no estoppel or ratification of them was not supported in the record. These matters are typically factual in nature and findings of fact by the trial court, of course, are not to be overturned unless clearly erroneous.

Finally, the appellant complains of the denial by the trial court of its motion to transfer the case to the Southern District of California for trial under the doctrine *forum non conveniens*, 28 U. S. C. A. § 1404(a). The trial court conducted a full hearing on this motion. Thus the law is as stated by this Court in *Pilot Life Ins. Co.* v. *Boone*, 5 Cir., 236 F. 2d 457, 461:

> "There is no indication that the District Court failed to give consideration to the convenience of the parties and the witnesses in the interest of justice, as required by the statute, and we cannot see that it abused its discretion in denying the motion for transfer."

The final judgment of the trial court was amply supported as to the construction of the contract touching on the one-half interest in the "variable participating royalty," as to jurisdiction of the court, the plaintiffs' title to the

claims, and absence of ratification. The Court did not err in refusing to transfer the suit for the convenience of the parties. The Court erred in holding that the plaintiffs were entitled to participate in the 3⅓% excess royalties.

For the correction of the judgment accordingly, the judgment is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion. Costs of this appeal are charged two-thirds to appellees and one-third to appellant.

APPENDIX B

Opinion of the District Court on the Merits (September 4, 1959)

This suit involves the rights of the parties to participate in the proceeds of oil produced from certain valuable oil properties located within the limits of the City of Los Angeles, California.

The Fox Film Company of New York purchased valuable acreage in the City of Los Angeles, California, adjacent to Beverly Hills for the erection of a studio in the production of moving pictures to be sold and exhibited to the public. Oil had been discovered in certain portions of the city and in 1924 upon the passing of the title to the property in question it was expressly stipulated as follows:

"No oil or gas well shall at any time be drilled, bored or explored on said property or any part thereof"

the owners and operators of the studio feeling that such drilling would interfere with their work in the production of pictures as planned by the studio.

Very rich production of oil was found in Long Beach and other portions of Los Angeles and it became apparent that the studio property was in all probability oil-bearing and in considerable quantities. The oil properties became more and more promising and drilling concerns approached the owners with reference to the execution of a lease thereon. The parties were confronted with the stipulation in the deed of years before that no drilling for oil should take place upon the property. Before any drilling could take place it was necessary to get the restriction or limitation removed.

The property in question was made up of four tracts as will appear upon the attached map marked appendix "A". [page 32a of this Appendix].

Opinion of the District Court on the Merits
(September 4, 1959)

In order to have this restriction removed the Twentieth Century-Fox made a proposal to the Janss people and the Fox Hills Corporation and their successors in ownership seeking to effect a deal with them by which the restriction or limitation might be removed. The opening communication for the transaction was embraced in two identical letters to the Fox Hills Corporation and to Janss and contained the following paragraphs:

". . . we shall pay you, or cause to be paid to you, when and as received by us or by any of our subsidiaries:

"(a) an amount equivalent to 8⅓% of the proceeds of all gas, oil or other hydrocarbon substances extracted from wells bottomed on the property hereinbefore described.

"(b) 50% of any bonus payments or land rentals (as distinguished from oil or gas royalties as the term royalties is generally understood and defined in connection with oil and gas leases) made by any lessee and received by us or by any of our subsidiaries as consideration for making or entering into any lease for the extraction of oil, gas or other hydrocarbon substances from wells bottomed on the said property hereinbefore described."

the property being described being that shown on the map.

The above proposal was accepted by the former owners who held the restrictions and limitations on the title. A written contract of considerable length set out in great detail the rights of the parties involved but contained in effect the foregoing conditions and obligations of paying 8⅓% of the gas and oil proceeds and also 50% bonus that might be received from the lease or development of the property. The contract releasing the restriction placed the burden and responsibility upon the owner in fee in whose

favor the restrictions were relieved of leasing the property and paying over the 8⅓% of the royalty and 50% of the bonus. The owner of the land thus became the agent, or we might say more accurately trustee, of the title to the property which obligated him in making the lease to make an equitable transaction so as not only to secure for the plaintiffs herein the 8⅓% of the royalty, which had been previously agreed to, but also to so negotiate if possible as to secure a bonus in which the plaintiffs would own a 50% interest.

Acting under the authority contained in this contract removing the restrictions, the Fox Realty Company, the defendant herein, executed a lease to the Universal Consolidated Oil Company, which company proceeded to develop the property and is now developing it, a number of wells having been drilled and payments being made from the proceeds. The lease actually drawn provides that the lessee, Universal Consolidated Oil Company, will pay a royalty of 20% and then further provides:

"(b) 50% variable participating royalty to be determined, computed and paid in a manner hereinafter provided in Section B of this agreement, which said 50% is hereinafter, for convenience, designated and referred to as 'variable participating royalty.'"

The plaintiffs insist and contend that this "variable participating royalty" was and is in fact a bonus and given this different name from ordinary royalty in an effort to escape paying ½ of the bonus as called for in the contract.

The plaintiffs claim one-half interest in this variable royalty when and if paid and also an equal share in the gross royalty of 20% on which the lease was executed.

Opinion of the District Court on the Merits
(September 4, 1959)

At the time of the hearing of this controversy some discussion was had as to whether or not the terms of the agreement and of the several provisions of the agreement were free from ambiguity. The Court held that they were in no sense ambiguous, and as a help to the mind of the reader we now set forth the several provisions which will be in the nature of review of what we have just said.

By deed of date, May 15, 1924, duly recorded in the Deed Records of Los Angeles County we find the following restrictions:

"No oil or gas well shall at any time be drilled, bored or explored on said property or any part thereof."

Letter from the Twentieth Century-Fox Film Corporation to the Janss Investment Corporation dated February 3, 1943:

"Gentlemen:

"By deed of May 15, 1924 and recorded on August 12, 1924 at page 16 of Book 3508 of the Official Records of Los Angeles County Recorder, you conveyed to us (then known as the Fox Film Corporation) certain premises now occupied by us for studio purposes.

"One of the conditions, restrictions and reservations recited in said deed is:

" 'That no oil, or gas well, shall at any time be drilled, bored or explored on said property or any part thereof.' "

The writer proposes a modification of the contract and says:

"We agree that if we or any subsidiary that we control should at any time drill or permit others to drill wells bot-

tomed upon our said studio premises we shall pay you, or cause to be paid to you, when and as received by us or any of our subsidiaries:

"(a) An amount equivalent to 8-⅓% of the proceeds of all gas, oil or other hydrocarbon substances extracted from wells bottomed on the property hereinbefore described.

"(b) 50% of any bonus payments or land rentals (as distinguished from oil or gas royalties as the term royalties is generally understood and defined in connection with oil and gas leases) made by any lessee and received by us or by any of our subsidiaries as consideration for making or entering into any lease for the extraction of oil, gas or other hydrocarbon substance from wells bottomed on the said property hereinbefore described . . .

"If this offer is accepted by you, please indicate the same by signing your name and affixing your corporate seal under the words "Accepted" at the end of this offer, and when so signed, sealed and received by us, prior to the date above fixed, this letter shall constitute an agreement between us. . . .

(Signed) "TWENTIETH CENTURY-FOX
FILM CORPORATION,
"By (S.) WM. GOETZ,
Vice President.

"Attest:

(S.) GEO. WASSON,
Assistant Secretary.

Opinion of the District Court on the Merits
(September 4, 1959)

"Accepted:

"JANSS INVESTMENT CORPORATION,
"By (S.) EDWIN JANSS.

"Attest:

CHAS. D. HAYES,
Secretary.

An identical agreement was contained in a letter to the Fox Hills Realty Company and was accepted by them as of February 3, 1943.

Minutes of the Janss Investment Corportion of February 4 set forth the foregoing agreement and authorized its execution.

Thereafter a confirmatory agreement of the above correspondence and acceptances was entered into by the parties on the 15th day of April, 1943 in which was recited the original transaction in which the restriction against drilling was recited and then embodied in the agreement was the same one as contained in the letters giving the former owner 8⅓% of the royalty and 50% of the bonus. This agreement was duly signed and executed by both parties.

"JANSS INVESTMENT CORPORATION
"By (S.) EDWIN JANSS,
President,
"By (S.) CHAS. D. HAYES,
Secretary,
First Party.
TWENTIETH CENTURY-FOX FILM CORPORATION,

Opinion of the District Court on the Merits
(September 4, 1959)

By (S.) WM. GOETZ,
Vice President,
By (S.) GEO. WASSON,
Assistant Secretary.
FOX REALTY CORPORATION
OF CALIFORNIA,
By (S.) ALFRED WRIGHT,
Vice President,
By (S.) GEO. WASSON,
Assistant Secretary,
Second Parties."

Thereafter on the 21st day of March 1952 the Fox Realty Company executed a lease to the Universal Consolidated Oil Company, a corporation. The lease described the land as shown in the foregoing map. It contains the following paragraphs relative to the royalty provision:

"Excepting, Reserving and Retaining unto Fox, its successors and assigns:

"(a) 11⅔% of all oil, gas and other hydrocarbon substances produced and saved from wells bottomed under the above described lands payable at the times and in the manner hereinafter provided in Section A of this agreement, which said 11⅔% is hereinafter, for convenience, designated and referred to as the 'royalty share;' and

"(b) 50% variable participating royalty to be determined, computed and paid in the manner hereinafter provided in Section B of this agreement, which said 50% is hereinafter, for convenience, designated and referred to as the 'variable participating royalty.'

Opinion of the District Court on the Merits
(September 4, 1959)

"Section A. Royalty Share.

"1. Eleven and two-thirds percent (11⅔%) of all oil, gas and other hydrocarbon substances produced, saved, sold or removed from wells bottomed under the demised lands is defined to be the 'royalty share' as such term is used herein in determining the manner, time and methods of computing the share of all such oil, gas and other hydrocarbon substances to which Lessor and its successors and assign are entitled.

Then the letters provided that the lessee should pay 8⅓% royalty to the Janss and Fox Hills Company.

In describing the second provision in the lease that pertains to royalty it was expressly stated:

"Section B. Variable Participating Royalty.

"The variable participating royalty reserved to Lessor hereunder shall be determined, computed and paid as follows:

"1. After the exclusion of said royalty share (to wit, 11⅔% of all oil, gas and other hydrocarbon substances produced, saved, sold or removed from wells bottomed under the demised lands and any amounts of oil or gas used or lost by Lessee in its operations under this agreement, and after the further exclusion of the Janss share (less any portion thereof which may not be deductible therefrom by virtue of the provisions of the contracts described and set forth in paragraph 9 of Section A hereof but which would be deductible from Lessee's share under the provisions of this lease), all remaining oil, gas and other

hydrocarbon substances produced, saved, sold or removed by means of wells bottomed under the demised lands shall be called 'operating production.'

"2. The term 'lease account' as used herein shall be construed to mean the account in which Lessee enters all income and all chargeable expenditures for the computation of the variable participating royalty under this lease, and the term 'variable participating royalty,' as it is used in this agreement, is hereby defined to be Lessor's proportionate share (to-wit, 50%) of operating production remaining after the recovery by Lessee of the following chargeable expenditures hereunder . . ."

There being no ambiguity in the foregoing provisions which led up to the drilling contract, the question before the Court is does the defendant, charged as it was with the execution of the lease, made to the Universal Consolidated Oil Company, owe the plaintiffs any bonus or bonus money resulting from the foregoing transaction.

The terms "royalty" and "bonus" have been defined as follows:

A "royalty" has definite characteristics which distinquish it from "bonus" and "rentals." "Royalty" is always defined as a certain fraction or percentage of the minerals which are retained by the owner of the land, as distinguished from a fixed or definite amount of money. The "royalty" continues throughout the whole term of the lease or until the minerals are depleted or exhausted. It is a reservation by the owner of a share of the product or profit from the land.

"Bonus," on the other hand, is a sum of money, fixed in amount, paid by a lessee to the owner of land as con-

sideration for the execution of the lease, which lease entitles the lessee to explore the property in search of minerals. Said sum is normally paid in cash upon the execution of the lease but on some occasion may be deferred and may become payable out of designated funds, including proceeds from later drilling operations. The essential characteristic of a "bonus" is not the form of the payment but rather the certainty as to the amount of the obligation.

"Bonus" has frequently been defined in the many decisions throughout the country.

In the case of Griffith vs. Taylor by the Supreme Court of Texas, 291 S. W. 2d 673, a definition is given which we also adopt: "In its broadest sense 'bonus' is any consideration given for a lease over and above the usual 1/8 royalty, whether the additional consideration be paid or payable and whether paid in cash or payable out of production". Quoting Black's Law Dictionary and other authorities.

The same decision goes further and defines the term:

"When used in this sense 'bonus' would include a share of production reserved in a lease in excess of the usual 1/8th even if the excess share was to continue throughout the life of the lease."

As we have before stated, the defendant in executing this lease acted not only for itself but for those who had signed this contract authorizing it to make the lease. Thus the defendant, Twentieth Century-Fox Film Corporation, had undertaken and agreed to execute a lease on the property in good faith and to give to the plaintiffs a royalty of 8 1/3% of the production and in addition thereto to give the plaintiffs one-half of any bonus that might be received. Now if

the defendant had provided in the lease for a bonus and stipulated what the bonus consisted of, then there would have been no ground for this lawsuit. But the lease being free from ambiguity, in the light of the contract and the relation of the parties the defendant's obligation as trustee was apparent. If it could have procured a bonus, it was its duty to have done so.

The defendant was able to lease the land on a royalty of the gross production of 20% showing that it was a valuable oil property, since 1/8 or 1/6 was ordinarily provided for in undeveloped regions. That it was further able to secure a variable royalty out of the net production shows conclusively that the lease had value over and above the ordinary leasable territory and for which a bonus could have been easily and reasonably required.

When the defendant executed the lease for a 20% gross royalty and a 50% variable royalty it was providing for some money to be received by itself that could otherwise have been treated as a bonus.

Now when the trustee makes a transaction in which he and the beneficiary of his trust are both interested and the trustee is authorized to act for both parties he must exact for his beneficiary every benefit that he exacts for himself. The plaintiffs were not present when that lease was drawn and could only speak through the trustee whose duty it was to speak and act for them.

It is our opinion that the 50% "variable royalty" is a part of the bonus when and if produced which was covered by the contract between the parties.

Now we turn back to the 20% gross royalty. By previous contract and agreement 8⅓% belonged to the plaintiffs,

whereas the lease rights out of the gross production was 20%. This left 11⅔% for the trustee and only 8⅓% to the plaintiffs which they were already entitled to under the previous contract. It was the duty of the defendant in executing that lease, under the terms of the conditions under which it became trustee and under the conditions in which it was authorized to act, to procure a bonus, and in addition to the variable royalty give the other party 50% of the lease for 20% and not limit plaintiffs to that which already belonged to them. It is the view of the Court that that royalty on gross production of 20% should have been divided equally so that the plaintiffs in addition to their 8⅓% should have received enough of the 20% to have given them at least enough to give the parties share and share alike so that from the gross proceeds the plaintiffs and the defendant would have been entitled to a royalty of 10% each.

In this same connection our attention has just been called to the decision of the Court and valuable comments thereon by the Supreme Court of Oklahoma in the case of Sykes vs. Dillingham, 318 P. 2d 416, 417 from which we take the following:

"The litigation stems from a clause in a mineral deed whereby Dillingham conveyed his undivided ¼th mineral interest in 30 acres of land to Sykes. This mineral deed dated October 20, 1923, otherwise in the usual form, contained the following provision: 'It is agreed that the grantor shall have one-half of the bonus money derived from the sale of an oil and gas lease or extension of same on the above land.' The problem is to determine whether Dillingham is entitled to one-half of the 'bonus money' received by Sykes on a lease executed by him in 1952 and, if so,

whether the 'bonus money' would include a portion of the 'excess royalty' . . .

"The trial Court found generally in favor of the defendant, Dillingham, giving him one-half of the cash bonus paid by the oil and gas lessee to Sykes as well as one-half of the royalty reserved by Sykes in excess of 1/8th of the production. Plaintiff, Sykes, appeals.

"We conclude that defendant Dillingham is entitled to one-half of the cash bonus and we think it follows that he is entitled to ½ of the 'excess royalty.' "

In commenting upon this decision Professor E. O. Kuntz makes the following very pertinent observations:

"Where one party holds the executive right or exclusive leasing power and other parties hold the right to share in royalties or the right to share in bonuses, the holder of the leasing power should be required to exercise the utmost fair dealing in establishing the amount of the royalty and the amount of the bonus. See Morriss v. First National Bank of Mission, 1 O&GR 1371 (Tex. Civ. App. 1952), and discussion notes, 1 O&GR 1388; see also Jones, 'Non-Participating Royalty,' 26 Texas L. Rev. 569 (1948). In the Morriss case, while examining the problem of whether a shut-in royalty was royalty or rental, a Texas Court significantly said: '(We) think the issue of whether the lessor DID create a royalty is not so important nor grave as the matter of whether the lessor COULD create a royalty different from the usual one-eighth out of actual production.' 1 O&GR 1371, 1380 (Emphasis supplied.) Considering as being done that which ought to be done, to borrow an ancient equity maxim, the Court could reach the conclusion that the payment is bonus or royalty or rental, depending upon what utmost fair dealing would

have required as between the holder of the leasing power and the holder of the interest subject to such power . . ." 8 O&GR 312, 313.

It is the opinion and judgment of the Court that the plaintiffs would be entitled to 10% of the gross royalty. Thus an additional 1⅔% should be paid to them as a part of what was due them as a bonus and that the plaintiffs are further due as a part of their bonus 50% of the "variable royalty" mentioned in the lease contract as payable to the lessor.

We have heretofore ruled in pre-trial hearing that several parties owning a very minute interest in this controversy were brought into Court as involuntary plaintiffs, that is, their interest was identical with that of those who brought the suit, and although being small in quantity they were proper parties to the suit. Objection is made to their being called involuntary plaintiffs. Had they been brought in by process as defendant it would have appeared from the pleading that they were entitled to recover as the plaintiffs were entitled to recover and it would thus have been the duty of the Court to have aligned them on that side of the controversy and such being true we overrule the objection to their being called involuntary plaintiffs.

We have at various stages of these proceedings overruled defendants objection to jurisdiction, venue and other questions and points raised in this vigorously fought controversy, these are adhered without further enumerating here.

This law suit virtually crystallizes around two documents. "A", the contract of April 15, 1943, dealing with and providing for under conditions named a royalty and a bonus. "B", the lease of March 21, 1952. The second

paper manifestly seeks to avoid the obligations imposed by the first. Judgment is rendered for plaintiffs in accordance herewith.

In the trial of this case vast records of documents and depositions have been compiled and accumulated. These were largely dealing with the supposed ambiguity in the in the contracts, which issue we find is not in the case. We will, therefore, direct that each party bear his own cost. This we would assume could be done from moneys being paid as present royalties from the pipe line handling the oil under agreement between the parties

T. WHITFIELD DAVIDSON,
United States District Judge.

Tract # 7620
Subdivided into Homes and Apartments

RANCHO COUNTRY CLUB

PICO BLVD.

HILLCREST COUNTRY CLUB

99.34 Acres (Including Olympic Blvd.)
Deeded in 1928 by Janss Inv. Co. and Holmby Corp. to Fox Film (now 20th Century Fox Fil Corp.

Covered by April 15, 1943 contract of Janss Inv. Corp.

OLYMPIC BOULEVARD

0.79 Acres Deeded April 1936 by Fox Hills Realty Co. to Fox Realty Corp. called "Parcel No. 2" in April 15, 1943 contract.

96.83 Acres (including S 1/2 of Olympic Blvd.) Deeded Sept. 15, 1936 by Fox Hills Realty Co. to Fox-Pico Corp. - called "Parcel No. 1" in April 15, 1943 Contract.

89.349 Acres (including N. 1/2 of Olympic Blvd.) called "Parcel No. 3" in April 15, 1943 Contract.

SANTA MONICA BLVD.

North Roadway

South Roadway

Los Angeles Country Club

32a

HEATH AVE.

CITY OF BEVERLY HILLS

APPENDIX C

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

Gentlemen:

In this hearing we have before us a motion to dismiss. It is urgently pressed by defendant's counsel and resisted with equal vigor by plaintiffs' attorneys.

The forum in which the controversy would ultimately be litigated will depend upon the ruling in the motion. The issues to be fought out will be materially shaped by the ruling.

The plaintiffs bring this suit allegedly for the construction of a contract for an accounting and for a money judgment touching certain oil payments set forth in a contract between the parties and their predecessors growing out of an oil lease made in the City of Los Angeles, California.

The plaintiffs claim to be the former stockholders and successors in interest to more than 98 per cent of the former holdings and interest of the Fox Hills Realty Company, a California corporation, together with the interest of the Janss Investment Company in the same property. It is alleged that the defendant, the Twentieth Century-Fox Films of Delaware, is the successor to the former company of the same name, a New York corporation, which has been dissolved and that the second company is obligated to carry out the contracts of the former company and is subject to its obligations and contracts.

The contracts and documents out of which the controversy arises bear upon the oil interest and production

of 286.309 acres in Los Angeles, California. It was sold by the former owner who retained 89 acres and a fraction of the land and also put limitations and drilling prohibitions and restrictions upon development of oil under the land that was sold and delivered. Later the defendant herein purchased the 89 acres for a large consideration and contemporaneously with the purchase contracted and stipulated with the former owners and grantors that the former owners would waive or relinquish the limitations that had been placed on the right of drilling for oil. And in connection with the waiver or release of this limitation those acquiring the land entered into certain stipulations and contractual obligations set forth as A and B in such contract of waiver of the former restriction.

In the offer as accepted February 3, 1943, Section A provided that those releasing and waiving the oil limitations with reference to drilling the land would thereafter receive 8⅓ per cent of the proceeds of all gas, oil or like substances extracted from the lease bottomed on the property described.

Section B provided that they would receive 50 per cent of any bonus payment or land rentals as distinguished from oil or gas royalties generally understood and defined in connection with oil and gas leases. The word 'bonus' being ordinarily accepted as the term describing the price paid in cash for the lease in addition to any royalties that might be retained.

Such provisions appear in the April contracts in paragraph 2 et seq of the Janss contract and paragraph 6 et seq of the Fox Hills contract.

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

In proven fields or property adjacent to proven fields such bonus is sometimes large.

The plaintiffs insist and allege that the defendant has sought in devious ways to escape the payment of this bonus by accepting money under other provisions and titles which in fact was a bonus. An accounting is called for in said matter and a construction of the terms and provisions for the contract.

Defendant moves to dismiss the suit on three principal grounds:

1. That the action involves title to real property located in California over which the Texas Federal Court has no jurisdiction.

2. That the Fox Realty Corporation of California, as lessor in the 1952 lease, is an indispensable party to the action and that since its being an indispensable party it must be brought into Court and when brought in there will not remain any diversity of citizenship and the suit will have to be dismissed for the want of jurisdiction.

3. That the suit is not between citizens of different states, particularly with reference to certain parties designated as involuntary plaintiffs and that the involuntary plaintiffs should be brought into Court and when brought in their presence would also destroy the jurisdiction of the Court for the want of diversity.

To each of these propositions the plaintiffs have replied urging numerous authorities as sustaining their position.

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

Under the first point urged the Court must decide if the declaration in the complaint calls for an adjudication of the title of real property. If it does, then the defendant's motion to dismiss should we think be sustained.

The complaint calls for a declaratory judgment and does not deal with the title to land in any portion but seeks a money payment and that the payment is to be from the proceeds of oil realized under the terms and provisions of certain written instruments.

We do not think it is necessary to adjudicate the title to land in order to determine the disposition of a sum of money which was realized from the sale of oil that came from the land. It involves of course the elementary subject of severance. Timber standing and growing on land is a part of the realty. After it is cut and removed and perhaps converted into lumber it is not a part of the realty but is personalty. Oil situated in the ground covered by an oil lease is a part of the realty until it is produced. After it is produced and put into a pipeline and removed from the premises it is no longer a part of the realty.

We think it reasonably clear that the title to the land is not involved in the controversy and will therefore overrule point one in the motion to dismiss.

The Indispensable Party. The Fox Realty Company of California is not a party to the suit. It is the lessor of the lease.

"An 'indispensable party' is one whose interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that his legal

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

presence as a party to the proceeding is an absolute necessity without which Court cannot proceed." Rule 19, Note 4 of the Federal Rules of Civil Procedure, Title 28 U. S. C. A. page 38.

If the California lessor were a party to the suit then there would be no diversity of citizenship and the defendant's motion would automatically prevail. But as we have held under point one, since the land is not in controversy neither is the oil not yet produced in controversy.

The thing in controversy is a written document and money produced under the provisions of such document. It can neither take from nor add to the holdings of the alleged indispensable party as his rights are vested and the suit does not seek to deprive him of any of such rights, nor could any judgment be rendered under the pleading that would affect such rights. If a contractual obligation creates property, rights or privileges which inure to the benefit of parties, they have a right to litigate over them.

If the suit does not affect the title to the realty, then we further conclude that the California company is not an indispensable party to the controversy.

We now come to the third point and that of the involuntary plaintiffs. Certain parties reside in the State of New Jersey who own small interests in common with the plaintiffs, their interest amounting to less than 2 per cent. These claims being small and the owners for reasons of their own having not entered into the controversy they are neither plaintiffs nor defendants in the suit. The plaintiffs notify them of the controversy and set them forth as pro-

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

vided in Rule 19 as involuntary plaintiffs. The law recognizes the status of the holder of a certain interest in a controversy whereby under a given state of facts he may be designated as an involuntary plaintiff. Through the years it has again and again devolved upon the Court to align the parties. At times the interest of a given defendant would be in common with those of the plaintiff and it would be necessary under such circumstances to align such person with those who held similar interest.

Allowing that the suit proceeds, what may be done with the interest of these persons described as involuntary plaintiffs? The Court could not arbitrarily take their interest and give it to the defendant and neither could the Court take it and divide it among the plaintiffs. The right must simply be recognized and set aside. And if their interest is contingent upon the claim of the plaintiffs and their right of recovery, if any, is identical with plaintiffs' then we think an appropriate title for them would be that described as involuntary plaintiffs.

Rule 19 expressly provides that persons having a joint interest shall be made parties and be joined on the same side as the plaintiff or the defendant. And when a person should join as a plaintiff refuses to do so he may be made a defendant or in proper cases an involuntary plaintiff.

We believe the case must be heard upon the merits. The motion to dismiss is denied.

Sincerely yours,

T. WHITFIELD DAVIDSON.

APPENDIX D

District Court's Opinion Denying Petitioner's Motion to Transfer (August 5, 1958)

OPINION OF THE COURT.

(T. Whitfield Davidson, United States District Judge)

When a Court has a case presented by good lawyers he can listen even overtime. When the Court hears good lawyers present their respective sides with zeal the Court possibly sometimes wishes he could reward both attorneys; but that is not his job. His job is not to try the lawyers, but to resolve the question.

Way back in this matter the Fox people were in New York. One of their branches is now making a motion to transfer this case from Dallas, Texas to California. The Fox people bedded out from New York. In California they had organizations, one succeeding another, and transactions of different form. As a result, they have claimants in this controversy in New York and in California, and a lawsuit in Texas.

One of the elements that enter into a removal or transfer of a civil case is, of course, the right of the plaintiff to select his forum. That is, if there be two Courts, either of which has jurisdiction of the controversy, then he may select which Court he will use. Then the other party, if he feels aggrieved and that he has been discommoded and that he will be handicapped in the production of the testimony and otherwise injured, he may make a motion to remove the case, to transfer it to another Court where there would be more convenience to the plaintiff and the defendant.

District Court's Opinion Denying Petitioner's Motion to Transfer
(August 5, 1958)

In this suit, as a matter of choice, the plaintiff might have brought his suit in New York. It might be easily understood that oil terminology and oil litigation would not be so well grasped and understood in New York as it would be in Texas or California. Then he had a choice between Texas or California.

Texas has been, more or less, in volume, a pioneer in the oil business in the United States. Pennsylvania was first, but in volume, Texas was, you might say, the pioneer. Therefore, it is not to be wondered that the decisions in California frequently cite decisions from Texas.

Now, the evidence is that the plaintiff, in selecting a forum, looked over the probabilities of getting a trial, and he went thoroughly into it from the report of the Administrative Office in Washington, and by going on the ground in both California and in Texas. And he came to the conclusion that he could get a trial much sooner in Texas than he would be able to get one in California. He brought his suit in Texas.

Then the defendant, through its counsel, Mr. Walker of California, filed an affidavit in which he seeks to remove the case to California.

Mr. Walker's affidavit, viewed in the light of the entire record, was a statement of facts, or a resume of the testimony that he hoped to produce. But it appears that he didn't know that he could produce it. Seemingly he had only conferred with one of the witnesses. It appears that some two or three other witnesses had been interviewed by a firm of attorneys other than Mr. Walker. From the questions that these attorneys asked these prospective witness it is mani-

fest that those attorneys were not equipped, they were not prepared, they were not informed very fully as to the nature of the controversy, and that they didn't ask the witnesses what particularly they knew; such questions as would be "were you at a certain place at a certain time?". That leases, stating it most liberally, the affidavit of Mr. Walker very badly crippled and we do not consider it sufficient, in the light of the test of cases, to justify a removal, in the light of all the other circumstances of the case.

Now much has been said about producing the witnessses in person rather than by deposition. In a tort case, like a criminal case, the attitude of the witness, his interest and bias can be so readily seen by the Court or Jury. In a contract case it is not so readily apparent, and it does not so often occur.

It impresses the Court in this case, in visioning the matter of the probable trial on the merits, that this case is going to turn, very largely, upon documentary evidence. Much evidence is sometimes offered in cases, but when the last and final summary of the matter comes around, it has to turn upon a written document. The written documents in this case and the conduct of the parties toward it will be the most important part of the trial. And the witnesses will be manifestly from the wide business experience they have, and they are a different type of witness than appears in these tort cases. They will be witnesses who understand the import of their testimony, and who have a fair knowledge of Court procedure. And in depositions they can make themselves, ordinarily, just as clear as they can by oral testimony. In many matters, such as contracts, wills, deeds

District Court's Opinion Denying Petitioner's Motion to Transfer
(August 5, 1958)

and contracts of this type the written testimony of witnesses is just as desirable as his sworn testimony in person. And then, finally, he escapes, if he is biased in any way, he escapes that cross examination that sometimes exterminates [illegible].

Viewing Mr. Walker' affidavit and the testimony affecting it, and considering the fact that the case can be produced and developed by deposition, we feel the evidence doesn't require a change or transfer from Texas to California.

We have plenty of work of our own, and we wouldn't object to those Judges over there taking it, but we can't take that into consideration.

An order will be entered denying the motion.

APPENDIX E

Judgment

Extract from the Minutes of January 23, 1961

TWENTIETH CENTURY-FOX FILM CORPORATION

No. 18,245

versus

PAUL C. TEAS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Paul C. Teas, and others, be condemned, in solido, to pay two-thirds of the costs in this Court; and that the appellant, Twentieth Century-Fox Film Corporation, be condemned to pay one-third of the costs, for all of which execution may be issued out of the said District Court.

* * * * *

APPENDIX F

Order Denying Rehearing

Extract from the Minutes of February 21, 1961

TWENTIETH CENTURY-FOX FILM CORPORATION

No. 18,245

versus

PAUL C. TEAS, ET AL.

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

* * * * *

Office-Supreme Court, U.S.
FILED
JUN 19 1961

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioner*,

v.

PAUL C. [illegible], ET AL., *Respondents*.

On Petition for Writ of Certiorari to the [illegible] Court of Appeals for the [illegible] Circuit

Respondents' Brief in Opposition

[illegible]
[illegible]
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INDEX

Page

OPINIONS BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

STATEMENT 6

Claims and Relief Sought as Shown in Complaint 7

Relief Accorded in the Decree 8

Respondents' Challenge of Certain Statements in Petition 10

Contract Setting As Found Below 12

Contract Excerpts Exhibiting a Purely Personal Promise to Pay Money 13

Other Pertinent Findings of Fact on Motion To Dismiss 15

A Further Statement on Denial of Petitioner's Motion to Transfer and Its Affirmance 16

A Summary of Record of Hearing on Motion to Transfer 19

1. Petitioner's affidavit which was contradicted and impeached. 19

2. Respondent's evidence at hearing on motion to transfer. 21

3. State of the record when it came before the Court of Appeals. 33

INDEX — Continued

Page

SUMMARY OF ARGUMENT 35

I. On Jurisdiction 35

II. On Motion to Transfer 40

ARGUMENT 44

Claims Asserted and Relief Sought and Granted Were Subject to the Jurisdiction of the Trial Court 44

What Is This Case? 50

Petitioner's Assertion That Contract in Question is Regarded by California Law to Create Only Interest in Real Property Not Supported by Petitioner's Cases 57

Holdings of Courts Below that Rights Asserted by Respondents of Personal Nature and Not for an Interest in Land is Supported by California Cases 62

Argument in Support of Court of Appeals' Affirmance of the Action of Trial Court Denying Petitioner's Motion to Transfer 69

CONCLUSION 74

LIST OF AUTHORITIES

Cases: *Page*

Boyce's Executors v. Grundy, 9 Pet. 275 (1835) 45
Bullen v. DeBritteville, 239 F. 2d 824
(9th Cir., 1956) 62, 63
Byrd-Frost, Inc. v. Elder, 93 F. 2d 30,
(5th Cir., 1937) 62, 64-5
Byrne v. Jones, 159 F. 321, (8th Cir., 1908) 46

Callahan v. Martin, 3 Cal. 2d 110,
43 P. 2d 788 (1935) 58-9
Camp v. Gress, 250 U.S. 308 (1918) 51
Chase v. Trimble, 69 Cal. App. 2d. 44,
158 P. 2d 247 (1945) 60
County of Los Angeles v. Continental Corp.,
113 Cal. App. 2d 207, 248 P. 2d 157 (1952) 58-9
Ellenwood v. Marietta Chair Co.,
158 U.S. 105 (1894) 45

Estes v. Shell Oil Co., 234 F. 2d 847 (5th Cir., 1956) 67

Fechteller et al. v. Palm Bros. & Co.,
133 F. 462 (1904) 62, 65

Graver Tank & Mfg. Co. v. Linde Air Products Co.,
336 U. S. 271 ..... 69, 70
Guarantee Trust, etc. v. Delta & Pine Land Co.,
104 F. 5 (5th Cir., 1900), *cert. den.*,
180 U. S. 636 (1901) 45, 46
Gulf Oil Corp. v. American Louisiana Pipe Line Co.,
282 F. 2d 401 (6th Cir., 1960) 49, 50
Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947) 71

Hall v. Jones, 54 S.W. 2d 835
(Tex. Civ. App., 1932, *err. ref.*) 46
Hayes v. O'Brien, 149 Ill. 403, 37 N.E. 73 (1894) 47

In re Broome's Estate, 166 Cal. App. 2d 488,
333 P. 2d 723 (1958) 62
In re Henshaw's Estate, 68 Cal. App. 2d 627,
157 P. 2d 390 (1945) 66

Keegan v. Humble Oil & Ref. Co.,
155 F. 2d 971, (5th Cir., 1946) 67

LIST OF AUTHORITIES—Continued

Cases: *Page*

La Laguna Ranch Co. v. Dodge,
18 Cal. 2d 132, 114 P. 2d 351 (1941) 60, 67
Livingston v. Jefferson, 15 Fed. Cas. 660,
(No. 8411) (C. C. D. Va., 1811) 45

Marks v. Fireman's Fund Ins. Co., 109 F. Supp. 800
(S.D.N.Y. 1953) 74
Massie v. Watts, 6 Cranch 148 (1810) 46
McElreath v. McElreath, 4 Tex. Sup. Ct. Journal 440
(Apr. 22, 1961) 46-7
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(S.D. Calif. 1957) 48
Milner v. Schaefer, 211 SW 2d 600 (Tex. Civ. App.,
1948, *err. ref.*) 50

Neet v. Holmes, 19 Cal. 2d 605, 122 P. 2d 557 (1942) 48
Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 70

Pan American Pet. Corp. v. Superior Court of the
State of Delaware, 29 U. S. L. Week 4477
(U.S., May 29, 1961) 51
Peninsula Trading & F. Co. v. Pac. Steam Whaling Co.,
123 Cal. 689, 56 P. 604 (1899) 54
Platner v. Vincent, 187 Cal. 443, 202 P. 655 (1921) 46-7, 51
Platner v. Vincent, 229 P. 24 (1924) 51
Promis v. Duke, 208 Cal. 420, 281 P. 613 (1929) 54

Recovery Oil Co. v. Van Acker, 79 Cal. App. 2d 639,
180 P. 2d 436 (1947) 59
Recovery Oil v. Van Acker 96 Cal. App. 2d 909,
216 P. 2d 483 (1950) 59
Redwood Inv. Co. v. Exley, 221 P. 973
(Calif. App. 1923) 49
Rozan v. Rozan, 49 Cal. 2d 322, 317 P. 2d 11 (1957) 49

Schiffman v. Richfield Oil Co. of Calif., 8 Cal. 2d 211,
64 P. 2d 1081 (1937) 60, 67
Simmons v. Superior Court, 96 Cal. App. 2d 119,
214 P. 2d 844 (1950) 47
Smith v. Davis, 90 Cal. 25, 27 P. 26 (1891) 49
Smith v. Sperling, 354 U. S. 91 (1957) 51

LIST OF AUTHORITIES—Continued

Cases: *Page*

Stone v. U. S., 167 U. S. 178 (1896) 44
Sunbeam Corp. v. Masters of Miami, 225 F. 2d 191, 192-3 (5th Cir.) 17

Taylor v. Taylor, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959) 58, 60
Texas & Pacific Ry. Co. v. City of New Orleans, 159 F. 2d 77 (5th Cir. 1947) 51
Tully v. Bailey, 46 Cal. App. 2d 195, 115 P. 2d 542 (1941) 54

U. S. v. National City Lines, 80 F. Supp. 734, 744 (S.D. Calif. 1948), *cert. den.*, 337 U. S. 78 (1948) 70

Williams v. Reed, 248 P. 2d 147, 153 (Calif. App. 1952) 52
Work v. Assoc. Almond Growers, 245 P. 790 (1926) 47

Texts:

Ann. Cas. 1912-C 539 54

69 L.R.A. 673 54
26 L.R.A. (N.S.) 928 ..... 45, 54
44 L.R.A. (N.S.) 267 54

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¶0.142 (2.-1) 46
¶0.145 (6.-1) 71

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Williston on Contracts, Vol. 2, Par. 320 51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. 980

TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioner*

vs.

PAUL C. TEAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Respondents' Brief in Opposition

Respondents, in opposing the writ sought, with deference first say that the petition and presentment which has been made to this Court, in an effort to show that the trial court did not have jurisdiction over the subject matter of this suit, does not accurately describe either the claims in suit or relief sought and granted in a diversity action brought only against petitioner as defendant below on its simple personal promise in a "joint and several" contract to pay money—of a transitory nature by logic, hoary precept and under decisions in all states—in which the courts below have entered judgment awarding and affirming only an *in personam* judgment against such defendant.

To what purpose would respondents have anywhere sued Twentieth Century to establish an interest in California real estate in which Twentieth had no title or interest either at the time the contracts were made in 1943 or afterwards?

Respondents unequivocally deny petitioner's assertion that by the established decisional law of California—or, for that matter, by any applicable California case—the contract obligation sought to be enforced in this suit against petitioner constituted or created an interest in real property.

With respect to petitioner's second ground, which charges the trial court with "an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision," respondents reject petitioner's factual premises and recital as being inaccurate and incomplete and as being upon a subject fully developed and heard at length by the trial court, which resolved any dispute by its findings against petitioner on this procedural matter; and after the Court of Appeals, with a 355-page record plus 21 exhibits of that full hearing before it, has declared it has discovered no indication that the District Court abused its discretion in refusing to transfer.

Opinions Below

1. Opinion of Court Appeals reported 286 F. 2d 373.

2. Opinion of District Court upon merits reported 178 F. Supp. 742.[1]

Its "letter opinion" denying petitioner's motion to

[1]District Court's later "Findings of Fact and Conclusions of law" entered prior to judgment appear R. 148-204.

dismiss appears R. 64.[2] Its "opinion" denying petitioner's motion to transfer (R. 86) (actually the trial court's remarks from the bench at the end of a two-day hearing on the facts concerning that issue, at the conclusion of which the court denied the motion[3] and later entered a formal order, R. 90, in which the court expressly found "for the plaintiffs on the facts").

Jurisdiction

The jurisdictional requisites for filing the petition for certiorari are adequately set forth in the petition. That such grounds exist as set out in the petition (p. 2 "Jurisdiction") under which the exercise of jurisdiction by this Court is invoked is challenged.

The basis for Federal jurisdiction in the court of first instance will be later shown.

Questions Presented

1. In deciding that respondents' claim against petitioner to establish and enforce the promise of petitioner as a joint and several[4] obligor in a written contract to pay[5] sums of money, measured by a specified

[2]Order overruling such motion when heard on the pleadings and affidavits (R. 83-4). Such motion was again heard and overruled at the conclusion of the trial when all facts had been fully developed. District Court's "Findings of Fact and Conclusions of law" on petitioner's motion to dismiss (R. 70-81), readopted after the full trial (R. 180).

[3]As appears in the court reporter's complete transcript of such hearing on motion to transfer, which was part of the record before the Court of Appeals although not printed and is now before the Supreme Court after certification by the Court of Appeals on motion of respondents under Rule 21, par. 6.

[4]"Second Parties jointly and severally agree to pay First Party, its successors or assigns" (R. 1756).

[5]". . . payable on or before the 20th day of the second calendar month following the month" during which the lessor was paid by any lessee (R. 1757).

fraction of certain proceeds[6] which might be thereafter received by a third party lessor under an oil and gas lease in which petitioner had no interest and covering lands in California *not* owned by petitioner either at the time of the contract, at the time of leasing, or at the time of suit or trial, was a claim seeking to declare and enforce a purely personal obligation and was not one for an interest in the California real estate, did the Court of Appeals thereby decide a question of California law contrary to and in conflict with the established law of such state as determined by its courts in applicable decisions?

2. Since this was an "episodic" suit requiring the proper interpretation of the unique terms of particular written contracts,[7] in which the courts below were required to determine the apparent *intention* of the parties from the language of the writings as examined in the factual setting in which they were made and to consider the position of the parties at the time and the objectives sought to be attained, and it having been determined by both of such courts *inter alia* that *as a matter of fact* as well as of law it was the *intention* of such parties in making and entering into such contracts to only create a personal obligation on the part of Twentieth Century to thereafter pay money, with no *intention* that the promisees should have any inter-

[6]". . . an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties, as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease" (R. 1756).

[7]Such contracts also contained *express* provisions under which promisors could be relieved on such joint and several personal covenants to pay money if the owner of the land should give a deed to promisees according to a form fully set out therein (R. 1759), which, if executed and delivered, *would* have had the effect of creating in respondents an interest in the real estate, but this was never done.

est in the real estate, and since the nature of the claims in suit and relief sought and granted in the courts below, as shown by the complaint and decree, was purely *in personam*, has the Court of Appeals decided an important state question in a way in conflict with California law applicable to the particular facts of and claims in the instant case as will be considered under Supreme Court Rule 19-1(b) as interpreted and applied by this Court?

3. Has the Court of Appeals, in affirming the trial court's judgment, so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the trial court, which exercised its discretion to deny a motion to transfer under Section 1404(a), as to require this Court to now exercise its supervisory powers in such a case as this, where the record affirmatively shows that (1) the trial court conducted a two-day hearing on petitioner's motion to transfer[8] and resolved all factual disputes in favor of respondents[9]; and (2) the Court of Appeals, with the complete record of such hearing before it[10], fully considered and rejected petitioner's charge of abuse of discretion, and held that there was no indication that the District Court failed to give consideration to the convenience of the parties and the witnesses and the interest of justice, as required by the statute?

---

[8]With a record of 2 volumes, totaling 355 pages, plus 21 exhibits offered by respondents.

[9]Movant in support of its burden to show that the cause should be transferred relied upon an affidavit which was so discredited by all other evidence at the hearing that the trial judge observed that "stating it most liberally," such affidavit is "very badly crippled" when considered "in the light of all the other circumstances of the case" (R. 88).

[10]Which was part of the appellate record although petitioner did not see fit to have it printed on appeal or to file it with this Court in support of petitioner's charge of abuse of discretion, but which record, in its original form, has been certified up to this Court at the request of respondents.

STATEMENT

Respondents as plaintiffs below brought this suit in April of 1958 as a transitory action based on diversity of citizenship in the United States District Court for the Northern District of Texas. Respondents were citizens and residents of Texas, California, New York and New Jersey. Petitioner was a corporation organized under the laws of the State of Delaware with its principal place of business in New York and with a permit to do business in the State of Texas and a registered agent for service in Dallas, within the Northern District of Texas. The amount in controversy, exclusive of interest and costs, exceeded the then requisite sum of $3,000.00.

Respondents as successors in interest to the original corporate promisees in the two April 15, 1943 contracts (P. Ex. 15, R. 292, 1726 and P. Ex. 16, R. 297, 1754) sued only Twentieth Century (corporate successor to the New York corporation of the same name) on its "joint and several" promise appearing in such contracts (R. 1737, 1740 and 1756) to thereafter pay to promisees "an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties, as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases)" which might be thereafter "paid as consideration for making and entering into any lease" by any lessee to lessor in the course of anticipated leasing for oil and gas of certain California lands referred to.

The record shows that in 1943, when the contracts were made, and at all subsequent times neither peti-

tioner nor its corporate predecessor had any title to or interest in any of the lands or minerals referred to in such contracts.

Claims and Relief Sought As Shown in Complaint

The complaint sought "a determination of Defendant's true obligation and duties toward Plaintiffs then and thereafter owed" (R. 93) arising under such 1943 contracts. After alleging (R. 94-99) the facts and circumstances which led up to and formed the setting for such contracts on April 15, 1943 and the terms and provisions of such contracts, such complaint described and quoted the language of the important "joint and several" promise of defendant contained in each of such contracts (as set out in the second preceding paragraph of this "Statement") (R. 101, 102) and alleged that, in consideration of such promises, promisees were then induced to surrender all of their former rights and restrictions on the title with respect to the mineral estate as reserved in earlier conveyances, and also to agree to convey the Northeast Tract (Parcel 3) in fee to petitioner's subsidiary, Fox Realty Corporation of California (R. 103), and that pursuant to such contract a deed absolute was thereafter given (R. 104).

The complaint then went on to allege the later leasing events which culminated in the lease dated March 22, 1952, which was given to Universal Consolidated Oil Company by such subsidiary corporation covering all of such lands, in which lease the 50% net profits interest was created (R. 106-7).

The prayer was that plaintiffs have appropriate judicial declarations made "with respect to Plaintiffs'

right to receive from and be paid by the Defendant herein the cash equivalent of 1/2 of any proceeds which may be hereafter paid . . . on account of the 50% net profits provisions contained in such lease, and that this Court determine and declare the true meaning and construction of Plaintiffs' rights under such 1943 agreements and contracts as against the Defendant herein and the extent of its obligations and covenants thereunder" (R. 112-113).

Relief Accorded in the Decree

By par. 1 (R. 205) of such decree it was provided:

> "1. This Court has jurisdiction of the parties and subject matter of this suit, and such suit is not one for land or any interest therein, but is to establish, enforce and declare the joint and several promises and obligations of defendant's corporate predecessor undertaken as promisor in the contracts sued on, the performance of which defendant assumed toward plaintiffs and involuntary plaintiffs; and Fox Realty Corporation of California (a wholly owned subsidiary of defendant and its predecessor), a joint and several obligor under said contracts, is not an indispensable party defendant to this suit."

By par. 4 (R. 206) of such decree is was provided:

> "4. That plaintiffs and involuntary plaintiffs do have and recover from defendant judgment which hereby determines, fixes and declares the rights of such plaintiffs and involuntary plaintiffs arising under the contracts sued on to be hereafter paid by the defendant, and the duty, obligation and requirement of such defendant under such contracts to hereafter pay to such plaintiffs

> and involuntary plaintiffs, and each of them, according to their respective interests and percentages as hereinafter shown, sums and amounts equivalent to fifty percent (50%) of any and all sums and amounts whatever which may be hereafter received either by or for the credit or benefit of such defendant or its subsidiary, Fox Realty Corporation of California, as lessor, in that certain oil and gas lease dated March 21, 1952, made and entered into with Universal Consolidated Oil Company, as lessee (or which may be hereafter paid, credited or received by or between any successor or assign of such companies), on account of or under those provisions of such lease which provide for the payment by such lessee to lessor of a 50% net profits interest and which is referred to therein as being a 'variable participating royalty.'"

By par. 7 (R. 209) it was expressly provided that the rights of plaintiffs "to be paid and defendant's obligations to make such payments as adjudged and declared in paragraph 4 . . . shall arise and become due and payable on or before the 20th day of the second calendar month following the month in which payments in money shall be made by such lessee" to Fox Realty Corporation of California as lessor (conforming with the provisions of the 1943 contracts, R. 1741 and 1757, and as alleged in the complaint, R. 101 and 103).[11]

[11] In respondents' "Statement" we omit any reference to the first promise made in these contracts to pay an amount equivalent to 8-1/3% of the proceeds of all production because not sued for an not in dispute. In describing the complaint and decree we have also omitted any reference to respondents' claim that petitioner's obligation to pay extended to "amounts equivalent to" 50% of the 3-1/3% by which the 11-2/3% "lessor's royalty" exceeded 8-1/3%, because although allowed in the trial court, the Court of Appeals reversed the judgment below to that extent.

Respondents' Direct Challenge of Certain Statements in the Petition

Nowhere in such complaint did respondents make any claim to an "interest in the proceeds from California oil and gas production," and neither of the courts below "decided" that such a "claim" was "not an interest in real property," as pretended in the first question presented by petitioner at p. 2 of such petition.

Contrary to further statements of petitioner in its "Statement of the Case":

There was no claim asserted by respondents "to a portion of the proceeds derived from the production of oil and gas on certain real property located in Los Angeles, California" (p. 4); there was no judgment of the District Court "awarding them (respondents) one-half of the variable participating royalty," as stated in the petition (p. 9); the Court of Appeals did not affirm any "District Court's award to respondents of one-half of the variable participating royalty," as the petition states (pp. 9-10).

There was no "real property affected by this action," which is stated as a fact in the petition (p. 5). The further statement in the petition (p. 7) that "the lease contained no provision for the payment of 'bonus' or 'rentals'" is only correct to the extent that the lease did not so label them. Both courts below found on the basis of evidence presented in the trial court that the net profits interest, labeled a "variable participating royalty"[12] in the lease, was a bonus; the Court

[12]Such term, then unknown in the California oil industry, was coined at the time the lease was drawn for the purpose among others of securing a tax advantage (R. 1427, 1428), and at about the same time when in

of Appeals opinion holding:

> "Such external evidence clearly supports the finding that the variable participating royalties are bonus payments." (286 F. 2d 373, 378).

The evidence before the trial court included the facts and circumstances under which the terms of the bids for the lease were controlled to specify the types of consideration to be given (R. 195), and that neither respondents nor their predecessors were ever consulted or advised concerning the making of any lease, and a short form of the lease was recorded so as to not disclose the consideration which lessee had agreed to give (R. 194, 195).

There was also extensive evidence of custom and usage (invited by the writings) on the meaning of leasing terms in the industry, upon which the trial court found as a fact:

> "The 'net profits interest' such as was provided in the 1952 lease to Universal Consolidated Oil Company was a 'bonus' under these 1943 contracts" (R. 190).

and that petitioner and its predecessor had full knowledge of such industry meaning of leasing terms through its "oil adviser" who was in its employ from 1942 continuously until after the lease was given (R. 192).

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the course of drawing such lease Clay, the attorney for lessee Universal, and Alfred Wright (the attorney for petitioner and its subsidiaries and an officer of Fox Realty and who had in 1943 with assistance of their "oil adviser" drawn the final 1943 contracts) were consulting as to the character of rights conferred on promisees in such 1943 contracts, and both such Califorina lawyers then agreed that only a personal "contract right" was given, and that such instruments clearly indicated "they were not royalty interests" (R. 1420, 1421, 1433).

Contract Setting as Found Below

As expressly found by the trial court,[13] prior to April 15, 1943, when these contracts were made, respondents' predecessors in right, who had once owned the whole 286 acres, had by successive deeds conveyed all but the northeast 89 acres (Parcel 3) by deeds (some with clauses for reverter and reentry) containing not only restrictions, reservations and conditions against drilling but also against development of any part of the mineral estate thereunder; and, when the deed with like restrictions and clauses was given to the southeast tract in 1936, under a contemporaneous contract it was, in addition, provided that if grantors or their successors should thereafter be called on to surrender said restrictions, "they would become entitled to one-half of any production in kind and to one-half of any proceeds therefrom" (R. 70); viz., 1/2 the minerals.

Such 1936 conveyance subject to the restrictions and contract mentioned was to Fox-Pico Corporation, another wholly owned subsidiary of petitioner's predecessor, and the title to this southeast tract so burdened was owned by it when the April 15, 1943 contracts were made, under the terms of which it became one of the "joint and several" promisors. (In December 1943 Fox-Pico deeded such tract to Fox Realty Corporation of California, and grantor was dissolved the next day, R. 74).

The west tract, which had been deeded to petitioner's predecessor in 1924 subject to the title restrictions mentioned, was in 1927 conveyed by it to Fox

[13]Findings of Fact on defendant's motion to dismiss, R. 70-79; readopted after trial on the merits, R. 180.

Realty Corporation of California, and which tract was owned by it thenceforth (R. 74).

The remaining northeast 89-acre tract, which was agreed to be conveyed to Fox Realty Corporation of California by the contract of April 15, 1943 (which was subject to an outstanding oil and gas lease which was also assigned) was thereafter deeded pursuant to such agreement (R. 71, 74).

As found by the District Court at the time such motion to dismiss was first presented and denied (R. 71), and by the court's later findings after the case was tried on the merits (R. 182, 185, 190, 195), the promisees in these 1943 contracts were required to and did surrender all of their former substantial respective titles and rights, both legal and equitable, in these lands and minerals in return for a joint and several promise in the form of a personal covenant that they would thereafter be paid amounts equal to and measured by specified fractions of lessor's receipts from future leasing for oil and gas.

Excerpts from the Contracts Exhibiting a Purely Personal Promise to Pay Money

The important obligation appears in the following language:

> "Beginning with the date of this agreement and continuing until there has been conveyed to First Party, its successors or assigns, eight and one-third per cent (8-1/3%) of the oil and mineral rights . . . in the manner described in paragraph 12 hereof, Second and Fourth Parties, jointly and severally, agree . . . to pay to First Party an amount equivalent to fifty per cent

> (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease." (R. 1737, 1740)

such contracts also providing that:

> "Any bonus payments herein provided for shall be paid on or before the 20th day of the second calendar month following the month in which said bonus payments are paid to the Second, Third or Fourth Parties, their successors or assigns." (R. 1741-2).

The contracts further provided:

> "12. The obligations of Second Party, Third Party and Fourth Party to pay to First Party, its successors or assigns . . . shall . . . cease and terminate . . ."

upon a deed being given to promisees according to a form fully set out therein (R. 1743).[14]

Except for a recital (R. 1748, 1763) that if payments should be made by depositing such sums to the credit of promisees at a named Los Angeles bank such would constitute compliance, no place of payment was fixed in these contracts.

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[14]The references above are to P. Ex. 15 (R. 292, 1726), which is the Fox Hills Realty Company contract, and parallel references to like language in the contract with Janns Investment Corporation appear P. Ex. 16 (R. 297, 1754 at R. 1756-58).

Other Pertinent Findings of Fact By the Trial Court on Motion To Dismiss

By an express finding of the trial court:

> "Such personal covenants by the written contracts of April 15, 1943, as undertaken and promised by Twentieth Century-Fox Film Corporation, and its wholy owned subsidiaries, were not 'joint' but were 'joint and several' and imposed a distinct and separate obligation on Twentieth Century-Fox Film Corporation and defendant as its successor." (R. 72).

The trial court further found that each of the parties who united in making the promises contained in these 1943 contracts received some benefit in consideration of it (R. 73). It further found as a fact that:

> "Plaintiffs' suit is not for land, nor any interest therein. Plaintiffs are neither assignees nor grantees under either assignments or deeds to any interest in the land or in the minerals therein. Plaintiffs are neither 'royalty owners' nor owners of any other mineral estate in the land. No rescission or cancellation is sought, and no lien is asserted or sought to be foreclosed."

and further that plaintiffs did not seek to divest any title or to attack the validity of the 1952 lease to Universal (R. 73). As further found by that court, plaintiffs "seek no relief against Fox Realty Corporation of California," and that such company was "not an indispensable party defendant" in such action, and that any decree which might be entered for plaintiffs "would not directly and adversely affect it; and a decree can be so framed as to leave it unaffected."

A Further Statement on the Denial of Petitioner's Motion to Transfer And Its Affirmance

On this phase of the case, Petitioner, having sought to short-cut the facts, record and all findings against it, must assume full responsibility for prolonging this response in order to make an accurate presentment.

After the trial court heard and overruled petitioner's motion to dismiss June 14, 1958 (R. 83), and two days after the case was called for a setting for trial on the merits,* the trial court conducted a two-day hearing on petitioner's motion to transfer, beginning August 4, 1958, and which resulted in a 355-page record plus respondents' 21 exhibits.

Petitioner's motion to transfer was couched only in the formal language of the Act of May 24, 1949, c. 139, §81, 63 Stat. 101 (28 U.S.C. §1404(a)) (R. 85), and at such hearing petitioner referred to an affidavit attached which it read into the record (Vol. 1, p. 9 R.M.T.**).

At such hearing respondents called four witnesses in addition to offering numerous affidavits, documents, copies of tables from the "Annual Report of the Director of the Administrative Office of the United States Courts" dated September 1957, and part of the Record of hearings before the Subcommittee of the

*At which docket call plaintiffs below requested such a setting on September 15, 1958, being one of two weeks with open dates for trial, but on objection and request for delay by defendant, the case was not set. (Record on Motion to Transfer, Vol. 2, pp. 64-5, 235-6).

***Note: All "R.M.T." references hereafter in this brief are to court reporter's original typewritten transcript of such hearing in two Volumes, which was part of the record before the Court of Appeals; although not printed (except court's oral ruling from bench at conclusion of such hearing, R. 86), and is now before the Supreme Court after cerification by the Court of Appeals on motion there of Respondents under Rule 21, par. 6.*

Committee on Appropriations, U. S. House of Representatives, 85th Congress, First Session, later referred to.

On appeal, petitioner did not designate any of such record and exhibits for printing with the exception already noted of the "Opinion" (R. 9, Item 5); and in Appellant's Brief in the Court of Appeals none of its five points of "Argument" were on the denial of the motion to transfer, although appellant's "Specification of Error" (No. 22) assigned such denial as error; and respondents in Appellees' Brief in answer to such specification presented separate Argument to affirmatively show that the trial court had *not* abused its discretion and supported same by references to such unprinted record.

The Court of Appeals, (which petitioner now charges has "sanctioned a radical departure from accepted standards of judicial procedure" such as to "call for an exercise of this Court's power of supervision,") despite the fact that such court had held in other cases that under its own Rules a matter not argued in a brief on appeal might be disregarded by that court,* nevertheless proceeded to fully consider and dispose of appellant's unsupported specification in its opinion (286 F. 2d at p. 380).

Now, in a petition for writ of certiorari in its ground (2) for invoking the jurisdiction of this Court (p. 2) and in its third "Question Presented" (p. 3) petitioner asks this Court to accept as true an unsupported, inaccurate and incomplete factual predicate and to conclude that both lower courts have been guilty of a gross abuse of discretion without anywhere

*Sumbeam Corp. v. Masters of Miami, 225 F. 2d 191, 192-3.

under its "Statement of the Case" (pp. 4-10) making a statement of the "facts material to the consideration of the question presented," as required by Supreme Court Rule 23-1(e), and without giving or referring to the facts as developed at the two-day hearing in the trial court on the motion to transfer. The only reference in such "Statement" as to what happened on the motion to transfer is a recital that such motion was filed, denied and affirmed on appeal coupled with an incomplete and unfair conclusion that:

> "Respondents resisted the motion principally on the ground that the matter could be brought to trial more rapidly in the Northern District of Texas and that few witnesses would be needed at the trial." (p. 9).

Thereafter under a heading "Reasons for Granting the Writ" in paragraph 3 (pp. 17-23) petitioner's argument proceeds upon an assumed state of facts concerning the convenience of witnesses and parties and the interests of justice with no review of the facts adduced or references to the record made before the trial court. In such uninhibited argument petitioner mentions none of the conflicts in the evidence, all of which were resolved against it by the findings of the trial court in its order denying the motion to transfer (R. 90):

> *"The court finds for the plaintiffs on the facts."*

Such presentment instead seeks to discredit the remarks of the trial court made extemporaneously from the bench at the conclusion of the lengthy hearings and makes the unwarranted charge that the trial judge did not properly consider the factors enumerated in 1404(a) (petition, pp. 20-2).

A Summary of the Record Made Of The Hearing on Motion to Transfer

1. Petitioner's affidavit which was contradicted and impeached.

The supporting affidavit attached to the motion to transfer was essentially based on (1) convenience of witnesses as named therein, (2) convenient access to records, and (3) that in order to try the case the court would need to "view the California lands involved."

It was stated by affiant that he had "personally interviewed or caused to be interviewed under my direct supervision" witnesses thereafter named with specified addresses, and that all lived in Los Angeles or its environs, and that "said California residents will not voluntarily . . . go to Texas" to testify.

The affidavit in par. 6 then listed three witnesses, F. L. Metzler, Edna Hollister, and Marie Chester, asserting that each had "participated in such negotiation, drafting and discussions" when the *1943* contracts were drawn (although admitting in par. 5 that Metzler was still an employee of petitioner and "has said that he is willing to go to Texas if requested to do so by the defendant.").

In par. 7 petitioner listed Joseph Jensen, John E. Clay, and C. J. Williams as being needed to offer testimony relating to events occurring *after* the *1952* lease was given to Universal by Fox Realty to establish that respondents' predecessors knew of the lease and of payments made thereunder and "acquiesced" in petitioner's interpretation of said contracts.

Paragraph 8 listed the names of 13 additional witnesses (and repeated 2 of those listed in par. 7) as being needed to testify that the lease to Universal was (1) made "in good faith" and (2) was not designed "to circumvent any proper obligation to plaintiffs" and (3) that Universal's offer to lease was "the best and fairest of all such inquiries and offers." (All such matters related to events in 1951, eight years *after* the contracts were made.)

The names of the witnesses which affiant swore *had been interviewed* and who were stated to have "personal knowledge" of the matters described in par. 8 were: William M. McDuffie, George Thompson, Frank Long, L. W. Frankley, Harold W. Hoots, Frank Morgan, Paul Milliken, Harold C. Morton, Chester F. Dooley, Charles S. Jones, W. E. Morgan, Sam Grinsfelder, and E. G. Starr.

In par. 11 it was asserted that qualified witnesses would be needed to testify to California custom and usage of terms, but none were named.

The documents which affiant said he had examined or supervised the examination of, and which were said were needed, were not specifically described or identified except generally as being (1) the files of defendant and its subsidiary relating to the acquisition and subsequent leasing of the land, and (2) records of Universal Consolidated Oil Company re status of net profits interest, and (3) those of the escrow bank to show deposits to the credit of the 8-1 3[illegible] (not in suit).

In par. 12 it was claimed that a court trying the case "would need to view the California lands involved."

In the concluding portions of the opening paragraphs of such affidavit, affiant said that his interviews with the named witnesses and examination of the records mentioned formed the basis of the claim that "the convenience of parties and the witnesses and the interest of justice" would be served by transfer to the California Southern District.

2. Respondents' evidence at the hearing on motion to transfer.

The record shows that after such affidavit was filed and before the hearing on the motion, respondent Gregson and his attorneys interviewed witnesses on such list and secured information from them *directly contradicting* matters contained in such affidavit; and that such attorneys in advance of the hearing on such motion requested that the author of such affidavit be present for cross examination when the motion was heard, and told such attorney for petitioner that direct contradiction was intended; and that if he could not come, to send someone of those who had acted under his supervision in conducting whatever investigation had been made so that the affidavit would have a sponsor who could be cross examined as to the truth and correctness of its contents (Vol. 2, p. 223, R.M.T.). Despite this, when the motion was heard, neither the author of the affidavit nor any other witness was present to sponsor it.

Respondents thereupon proved:

(1) The only persons alive who had taken part in the discussions and negotiations leading up to and culminating in the 1943 contracts were F. L. Metzler, who represented promisors, and George Gregson, who

represented promisees in such transactions, and that these two were the only "key" witnesses. F. L. Metzler's oral deposition had already been fully taken and transcribed at the time of the hearing on the motion to transfer. That he had been assigned by petitioner to give his full time to the matter after the suit was filed and was still an employee of petitioner, and had stated in his deposition that he would attend a trial in Texas, if requested by petitioner. That respondents both in writing and at the hearing on such motion offered to pay all his expenses of attending the Texas trial and were ready, able and willing to do so. (Metzler later attended in person both pre-trial and trial on the merits and testified.)

Gregson testified that he had been actively engaged in drilling "a lot of wells in Texas" together with respondent Paul C. Teas since about 1948 or 1949 and was in Texas and at Dallas frequently on that account, and it would be convenient to him to attend a trial at Dallas; and that his father in law, Dr. Edwin Janss, and the latter's brother, Harold Janss, both respondents who had had some minor contracts in the course of making the contracts, would and could with convenience attend the Texas trial. (All three later personally attended the Texas trial on the merits.)

(2) Respondents proved by the affidavits of Edna Hollister and Marie Chester (P. Exs. 1 and 2, introduced Vol. 2, p. 39, R.M.T.*) and by the testimony of

*Note: As to location of exhibits introduced at the hearing on the motion to transfer: photostats of the tables are in the back of Vol. 2; the affidavits were filed prior to the hearing, and are contained in the group of filed instruments certified up to this Court in original form on Motion of Respondents, and are there arranged by date of filing, as indexed by the clerk's docket (R. 2-8).

the witness Cantey (Vol. 2, pp. 27-36 and pp. 36-40, R.M.T.) that, contrary to petitioner's affidavit, neither of them had been present during any negotiations or discussions while the contracts were being drawn; Marie Chester did not go to work for Alfred Wright, who was respondents' resident counsel, until June 1943 *after* the final contracts were executed and delivered in April. Edna Hollister had typed one letter and one of the yellow drafts of the contracts, but except for being able to identify her typing of such instruments she knew nothing whatever, and during the ten years she worked for Wright she was never present during any discussion with a client. She had never met either Metzler or Gregson. Each had been telephoned by some unnamed person from Loeb & Loeb. Hollister was asked concerning the dates and duration of her employment by Alfred Wright, but nothing else. Chester was asked when she went to work for Alfred Wright and where Hollister could be located, and nothing else. Hollister said that if desired she would be "happy" to attend and testify in any court, including Texas.

(3) Respondents offered the affidavit of Joseph Jensen (P. Ex. 7, Vol. 2, p. 92, R.M.T.), named as a "necessary" witness to prove matters in par. 7 of petitioner's affidavit, in which he says that, after reading par. 7: "In fact, affiant has no knowledge of such matters and could not testify to the truth of such matters," going on to state what contacts he had had with Gregson by telephone in 1954, and that he was wholly unacquainted with the terms of any contracts made in 1943 and had never discussed them with Gregson. (Joseph Jensen attended in person the Texas trial on the merits, being called to the stand by respondents to prove some other matters.)

John E. Clay and C. J. Williams, who were not interviewed after the filing of petitioner's affidavit, had been previously visited by respondents' attorney, at which time it was ascertained that their only contact with the matter was in 1951-2 and the extent of their knowledge with respect to any transactions was that they had made an offer and took a lease in behalf of Universal and thought it was good property; and that the terms of the lease had been drafted by Mr. Clay after contacts with petitioner's representatives, and he was responsible for some of the terms employed in such lease (Vol. 2, pp. 211-14, R.M.T.) (Oral depositions of both Williams and Clay were later taken, and such depositions were offered at the trial (R. 1409-1450, 1459, 1471, 1593, 1623.)

(4) In contradiction of the statments in par. 8 of petitioner's affidavit, which listed 13 additional witnesses, previously named, respondents secured and offered affidavits of seven of those listed, to wit: Frank Long (P. Ex. 8, Vol. 2, p. 120, R.M.T.); L. W. Frankley (P. Ex. 9, Vol. 2, p. 124, R.M.T.); Charles S. Jones (P. Ex. 10, Vol. 2, p. 137, R.M.T.); Sam Grinsfelder (P. Ex. 11, Vol. 2, p. 142, R.M.T.); Paul H. Milliken (P. Ex. 13, Vol. 2, p. 216, R.M.T.); and a joint affidavit of Harold C. Morton and Chester Dolley (P. Ex. 14, Vol. 2, p. 218, R.M.T.); and a letter from Frank A. Morgan dated 7-30-58 (P. Ex. 15, Vol. 2, p. 222, R.M.T.).

In each of such affidavits affiants denied personal knowledge and stated that they could not testify to the matters in par. 8. Long stated that no one representing defendant or any of its attorneys "has ever asked affiant concerning his knowledge or lack of it as to any of the matters which such affidavit says

they propose to prove by him as a necessary witness for such defendant." Frankley stated in his affidavit that his only contact had been on June 13, acting in behalf of Indian Oil Company to make an offer in a letter to lease the property, which was rejected. Jones stated that his only contact had been to unsuccessfully negotiate for a lease in behalf of Richfield (in 1951) prior to the lease to Universal. Grinsfelder stated that he "understands that an indetermined number of offers were made" for a lease in the year 1951, and that he in behalf of Union Oil in that year made a proposal for a lease rejected by Metzler's letter of September 25, 1951, and later sent a telegraphic bid on October 2, 1951, which was not accepted, and that such constituted the extent of his knowledge. In Milliken's affidavit he stated: "I have no direct knowledge of the matters alleged in said paragraph 8, except that I know that an indetermined number of inquiries and offers were made." Morton and Dolley stated that their only previous contact had been in the fall of 1951 to submit a bid for Atlantic, which was sent to Chase National Bank in New York, as directed, and affiants were informed later that Universal's offer had been accepted and a lease given to that company, and that thereafter they had become one of counsel for respondents, and contrary to petitioner's affidavit, no representative of petitioner had ever interviewed them on any matters contained in petitioner's affidavit and they "have given defendant no reason to suppose that the matters set forth in paragraph 8 are true."

Testimony concerning petitioner's contacts with Frank Morgan (Vol. 2, pp. 219-22, R.M.T.) showed he had been contacted by the author of petitioner's affidav-

it and was reluctant to make an affidavit against him and stated "that he didn't want to give a deposition to say he didn't have personal knowledge on the matters contained in that affidavit where he was named as having it," but that "I don't have such information and personal knowledge," and in his letter expressed a willingness to come to Texas to testify if needed. The address given in petitioner's affidavit was one he had moved away from (Vol. 2, p. 131, R.M.T.).

Respondents offered testimony by Gregson showing that McDuffie lived no longer at the address given by petitioner and had moved to Santa Barbara and could only be reached by telephone (Vol. 2, pp. 107-112, R.M.T.) and had been very ill for some time and on being read petitioner's affidavit denied knowledge of any of the matters contained in par. 8 (*Id.*, p. 110) and said that no one representing petitioner had called him or contacted him (*Id.*, p. 111) and stated he was retired and "that he had three doctors that wouldn't let him testify anywhere, wouldn't let him write a letter, wouldn't let him give answers to written interrogatories" (*Id.*, p. 276).

Concerning George Thompson, Gregson testified that he finally contacted him and Thompson stated that the only thing he knew was that he had been president of Hillcrest Country Club, which adjoined the studio on the south, and that at one time there had been some conversation about drilling the country club property from a site on the studio, and that he knew nothing about the 1952 lease and did not know the 1943 contracts existed or concerning any other matters mentioned in petitioner's affidavit (Vol. 2, pp. 114-16, R.M.T.).

Respondents proved by Gregson that Harold W. Hoots no longer lived at the Los Angeles address given in petitioner's affidavit, and that he had moved to Grant's Pass, Oregon, with no plans to return to Los Angeles, and stated, on being called in Oregon, that "he had no idea about any of the items that I read to him, which were all in paragraph 8," and that he had been an engineer for G & M Oil Co. at the time a joint bid with Atlantic was worked out. He had *never* talked to anybody representing petitioner about any of such matters (Vol. 2, pp. 129-131, R.M.T.).

Respondents proved by Gregson that W. E. Morgan, whose address was given in Petitioner's affidavit as "Union Oil Center" in Los Angeles, had moved from Los Angeles to Denver, Colorado, in the fall of 1951, and had severed his connections with Union in 1955 and for the preceding seven years resided and had his office in Denver, Colorado (Vol. 2, pp. 137-9, R.M.T.)

(By time of trial on the merits petitioner had taken depositions of none of the persons listed in its supporting affidavit except Clay and Williams, and called none of them in person. The record shows that it took the deposition of its former officer H. G. Place in New York and a stipulation was made concerning testimony of Sherman Adams of Boston, Massachusetts. Henderson, petitioner's treasurer from New York, was present at the trial on the merits but was not called to testify.)

(5) Respondents proved they had nine Texas witnesses whom they had contacted previously and who were highly qualified and available to testify concerning California oil and gas industry custom and usage

as to the meaning of pertinent terms, most of them residing in Dallas and Fort Worth in the Northern District of Texas, but who had had extensive experience in the oil and gas industry and in leasing practices in the Los Angeles Basin in the year 1943 and subsequently, as well as in other oil-producing states. A list giving the names of such witnesses was referred to and given to petitioner. (At the trial on the merits one of the two such witnesses called by respondents resided in Dallas, but had been an officer of Seaboard with extensive leasing experience in the pertinent area at the time of the contracts. At the petitioner's insistence and over objection of respondents, the trial court limited each side to two expert witnesses each. One of petitioner's industry usage witnesses, Carl T. Long, had an office and place of business in Dallas, Texas, as well as in California (R. 1480), and its other witness, Carver, was sent to testify by his employer, General Petroleum Corporation (R. 981).)

(6) Concerning any necessity for resort to files, records and documents of petitioner, respondents proved that when the Metzler and Gregson oral depositions were taken prior to the hearing on the motion to transfer there had been an exchange of documents, and each side had been permitted to make copies of all pertinent documents. Petitioner's production of documents had been in response to subpoena duces tecum (Vol. 2, pp. 147-8, R.M.T.). Many of such copies produced had come from petitioner's records in New York (Vol. 2, p. 146, R.M.T.). Respondents agreed in open court to demand the production of no original documents at trial and for the use of photostatic copies and offered to pay for copying same (Vol. 2, p. 225, R.M.T.).

With respect to any need for current statements from lessee, Universal Consolidated Oil Company, on the status of the net profits interest, respondents proved that Universal was furnishing such statements monthly and offered in evidence a statement of 6-30-58 (P. Ex. 12, Vol. 2, p. 146, R.M.T.) and proved that only a dollar figure was needed at trial and that such statements consisted of one page plus four supporting pages (Vol. 2, pp. 145, 226, R.M.T.). Respondents in open court agreed to accept such statements, thereby eliminating any need for original records.

With respect to any records at the escrow bank, respondents showed that all such records and credits related only to the 8-1/3% (not in suit) (Vol. 2, p. 86, R.M.T.).

(7) At the conclusion of such hearing the trial court observed from the bench:

> "That leaves, stating it most liberally, the affidavit of Mr. Walker very badly crippled, and we do not consider it sufficient, in the light of the test of cases, to justify removal, in the light of all the other circumstances of the case."

and thereafter in its order denying such motion that court expressly found for respondents on the facts (R. 90).

(8) Respondents also offered extensive testimony to negate any inference of "forum shopping," as now charged in the petition.

As previously stated, respondents proved that Gregson and the Janss family had been, in association with respondent Teas, actively engage in the oil business in Texas since 1948 or 1949 and had drilled a lot of

wells together (Vol. 2, p. 158, R.M.T.). That during the first half of 1957 Gregson had discussed with his long time friend and business associate, Paul C. Teas, who was a geologist and in the oil business both in California and Texas, the 1943 contracts and the later lease to Universal and had secured Teas' advice and opinion as to the rights of the promisees to be paid an amount equal to half of the net profits interest as constituting a bonus. That long prior to any determination being made to file a suit in Texas and before it was learned that petitioner had a place of business in Texas and a permit and agent in such state, Teas recommended the Fort Worth attorneys because they had previously successfully represented him and some California clients in earlier important oil and gas litigation (Teas dep., p. 18) and made the contact and brought Gregson to see them (Vol. 2, p. 157, R.M.T.), and Gregson asked them to undertake the case on a contingent basis (Vol. 2, p. 168, R.M.T.). Gregson testified such Texas attorneys were engaged only because of their reputation and experience in oil and gas cases which he confirmed from sources other than Teas.

During the summer and fall of 1957, while such attorneys were working on the case, filing suit in Texas was not contemplated, and it was expected to be filed in either California or New York, and it was not until the latter part of 1957 or early 1958 that it was determined to file it in Texas (Vol. 2, p. 209, R.M.T.).

Such attorneys before finally determining where to file such suit made an extensive investigation for the purpose of determining the matter of where an ex-

peditious trial might be secured and concerning the relative condition of the dockets of the respective U. S. District Courts at Los Angeles and at Dallas. Such included consultations with a number of Los Angeles lawyers and firms who estimated a delay of 1-1 2 to 2 years and a visit by respondents' attorneys to the clerk's office for the Southern District at Los Angeles (Vol. 2, p. 227, R.M.T.). In addition, such attorneys examined all information contained in the September 1957 "Annual Report of the Director of the Administrative Office of the United States Courts" concerning time intervals between trial and disposition of civil cases as between the trial courts and as between the Courts of Appeals. (Later offered in evidence by respondents at the hearing on motion to transfer as P. Exs. 16-20, Vol. 2, pp. 229, 230, 231, 232, R.M.T.).

The uncertainties and delays to which the suit would have been exposed under the condition of the docket and trial calendars and rotation system in the Southern District of California was fully shown (Vol. 2, p. 228, R.M.T.).

That it was the opinion of respondents' attorneys, after making all such an investigation, that if the case should be filed in the Southern District of California, a delay from a year and a half to two years might be anticipated while the average time in the Northern District of Texas was six months (Vol. 2, p. 232, R.M.T.). It also appeared that appellate disposition by the 5th Circuit would be much more prompt than before the 9th Circuit (Vol. 2, pp. 237-8, R.M.T.).

(9) Such was the character of the evidence adduced before the trial court, which affirmatively showed re-

spondents' reasons for not filing the suit in either New York or California.

(10) While, as correctly stated in the petition, it appears in his deposition that Teas received no written assignment until about the time the suit was filed, it further appears in such deposition that in October or November 1957, when on a trip to Los Angeles, Teas talked to Gregson about putting some money into the case (*Id.*, p. 14), and in February 1958 was back out there and they discussed the terms and price, and it became a deal (*Id.*, p. 15). In explaining why it was determined to sell a small fraction to Teas, Gregson testified at the hearing on motion to transfer that he wanted the benefit of Teas' experience and his assistance in contacting other qualified witnesses on custom and usage in the oil industry, and that by that time Gregson had already been advancing some of the expenses personally because there were 13 or 14 people interested, and "I felt that if we had some funds on hand to go forward toward defraying some of the costs, it would place less of a burden on me" (Vol. 2, pp. 167-8, R.M.T.).

Gregson testified positively that he did not recommend the sale and assignment of such interest to Teas in order to file the suit in Texas (Vol. 2, pp. 168-9, R.M.T.). (At the trial on the merits Teas attended the trial, but was not called by respondent as a witness on industry usage when the trial court decided to limit the number of witnesses which each side would be permitted to call and later reduced the number from 3 to 2 at the request of petitioner and over objection of respondents (R. 1560-65).)

3. State of the record when it came before the Court of Appeals:

That petitioner did not designate such record for printing or attempt to support its specification of error based on a denial of such motion among the points which it argued in Appellant's Brief filed there has been stated.

By that time the case had been fully tried on the merits and a printed record was before the Court of Appeals affirmatively showing:

(1) That the only two "key" witnesses, Gregson and Metzler, had attended and testified in person.

(2) That the only officers representing petitioner and attending such trial came from New York.

(3) That petitioner's regular attorney in Texas who resided at Dallas and who had presented the motion to transfer took an important part at the trial on the merits, which was also attended by petitioner's regular New York attorneys, as well as attorneys from California.

(4) That the only limitation which was placed on the number of witnesses was as to the number of experts on industry usage of terms, and that such limitation was imposed by the court at petitioner's request over respondents' objection.

(5) That petitioner had taken no depositions of any of the persons named in his previous affidavit except the oral depositions of Clay and Williams of Universal, which depositions were admitted.

(6) That petitioner had been accorded a full and fair trial, including pre-trials as well as the trial on

the merits, and had been permitted to fully develop all of its defenses.

(7) That, shortly prior to Dec. 8, 1958 (date of original trial setting on merits), petitioner on a Nov. 29, 1958 hearing sought and secured a Pre-Trial hearing for Dec. 8, 1958 and a postponement of trial to afford its counsel more time. (This explains why almost a year elapsed between filing and trial, which lapse petitioner pretends (p. 22, footnote) shows no more expeditious trial was available in N.D. of Texas than in S.D. of Calif.)

(8) That it was not asserted that petitioner had suffered any prejudice or been denied an opportunity to offer any documentary evidence desired, and that copies had been used and accepted at such trial with no demand for originals.

(9) That many of such copies came from the files and records of petitioner's place of business in New York, and that each side had been allowed to fully present copies from records in Los Angeles.

(10) That the California law of contracts is substantially the same as Texas law of contracts as well as elsewhere.

(11) That the testimony which petitioner hoped to secure from the persons listed in petitioner's affidavit presented at the hearing below dealt with immaterial and irrelevant matters.

SUMMARY OF ARGUMENT

I. Argument on jurisdiction:

Diversity and requisite amount in suit being undisputed, we examine the question of whether the District Court in Texas had jurisdiction of the subject matter.

Such is determined by the "gravamen of the action" and its "essential features" from the allegations in the complaint and relief sought. The Federal Courts and the courts of Texas and California have many times held a claim seeking to enforce a promise to pay money is by its nature "transitory" and not "local."

The complaint under scrutiny declares that petitioner promised respondents to pay money, and that such promise should be established and enforced against petitioner with an accounting. Whether considered for jurisdictional or venue purposes, such a claim is against the person and results only in a judgment *in personam*, such as entered in the instant case. Such an action is sustainable wherever the defendant may be found, as stated long ago in *Livingston*.

While a decree rendered in one state cannot *ex proprio vigore* directly affect title to lands in another, jurisdiction is not lacking to enter and enforce a decree in equity acting upon the person of a defendant who is before the court. References to land in a contract may be, as here, only "incidental."

In answering the question, "What is this case?" it is also essential to consider what is *not* claimed in such suit and what rights were *not* conferred on respondents under such contracts.

Petitioner's promise was a "joint and several" one,

and respondents could, under the law of California and elsewhere, sue Twentieth Century alone, and Fox Realty was not an indispensable party. But it is petitioner's argument that its promise could be nowhere enforced against it unless Fox Realty was also sued.

The defendant below was *not the owner of the land*, nor did it own any interest in the minerals at the time the contract was made or at any time thereafter, and it is unnecessary to consider what sort of complaint might have been filed, but which was not, against Fox Realty as the other "joint and several" obligor.

By such contracts it was the promise that petitioner would pay to promisees on the 20th day of the second calendar month *after* the month during which another corporation was paid by any lessee a sum of money equal to and measured by a specified fraction of those receipts. It was no more than a yardstick.

In return promisees parted with all their former rights, titles and interests in the land and in any minerals which might be thereafter produced therefrom. A complete surrender of title was affected by contemporaneous releases and assignments, and a later deed given not to petitioner but to Fox Realty and all legal and equitable title passed to the latter.

The instant suit asserts no claim to the lease "proceeds" as such, and the defendant below owned none of them. It was not agreed in our contracts that promisees should own a share in any of the leasing proceeds as such, nor was a fund created out of which such payments were to be made. Language appropriate to create such a right is not to be found in such

writings. Other clauses as we shall see forbid the idea.

Respondents might have asserted in the complaint (without warrant) that they owned a "royalty" or that a lien should be fixed and enforced against a part of the oil and gas production, but such was not alleged, and no such relief was sought or granted. But such is the premise of petitioner.

All rights of Fox Realty as lessor to have Universal as lessee fully perform its obligations under such lease and to retain the benefits therefrom remain unimpaired by this suit and judgment. Any lament on the part of the subsidiary that the parent company may be forced to keep its 1943 promise to pay respondents a sum equal to and measured by a part of lessor's future receipts is but an indirect consequence and irrelevant.

To ascribe an "impact" upon the "real property rights of Fox Realty" is to disregard the separate corporate entities, but the assertion that Fox Realty is an "indispensable party" whose joinder would destroy diversity depends on recognition of the separate entities.

Petitioner's statement that respondents have been "awarded" by the courts below one-half of the so-called "variable participating royalty" is contradicted by the relief granted and affirmed.

Petitioner proceeds upon a false predicate. Its primary assertion that respondents claim "an interest in proceeds from California oil and gas production," and that the courts below have "decided" in "conflict with applicable California decisions" that such is not a

claim for "an interest in real property" is unfounded. The courts below did not so "decide," and no such question was before them.

The seven California cases cited by petitioner to support its assertion that "the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property" are inapplicable. No such holding is to be found in such cases.

In none of them was plaintiff seeking to recover against a stranger to the title. In none was plaintiff's claim limited to a simple demand for the enforcement of a contract to pay money based upon mere privity of contract as distinguished from privity of estate. In none was A seeking to enforce B's promise to pay money in an amount equal to and measured by C's future receipts. None involved any question of jurisdiction or whether the action was local or transitory or any asserted defect of parties.

Five, *Callahan*, *Van Acker*, *Schiffman*, *Chase* and *La Laguna*, were suits to establish rights either granted or reserved in actual conveyances or assignments against other parties in privity of estate.

In the *County of L. A.* tax case the court found that the contract examined was by its terms in effect an ordinary oil and gas lease which conferred possessory rights requisite to the application of a particular taxing statute. In the only other case cited, *Taylor*, the interest asserted was in the proceeds as such, and privity of estate was claimed.

In none of them was the court construing contracts like ours and in none was it decided that such a con-

tract conferred an interest in land. Other distinguishing features render them inapplicable.

The California courts have acted with discrimination and have made limited holdings on the precise issues joined.

There are, however, unmistakable holdings in California and elsewhere that a contract containing promissory language such as found in the 1943 contracts, viz., a promise to pay "an amount equivalent to" receipts, proceeds or profits creates only a general obligation to pay money to the promisee as a *creditor*. It has further been held that such a promise does *not* create any interest in land or in proceeds or profits as such.

In the instant case the findings below that it was the *intention* of the parties to create only a personal obligation to pay money and to confer no interest in the land or against the mineral proceeds as such was upon a question of *fact* and has foreclosed the inquiry.

When the lease was being taken by Universal, both the experienced California lawyers agreed that such 1943 interests conferred on promisees only "a contract interest" and that "they were not royalty interests." One of them, representing petitioner and its subsidiaries and who was a Fox Realty officer, had helped draw the 1943 contracts and the other represented Universal as lessee.

That it was the *intention* of the parties to these contracts that promisors made only a personal promise to pay money was *rendered unmistakable by express clauses* in such contracts providing that such personal covenants would expire when and if the landowner

should thereafter execute and deliver a deed in a prescribed form under which the grantee would have been thereupon and thereafter invested with an interest in the minerals and proceeds, but this was never done.

It must be concluded that the Court of Appeals, in affirming the judgment of the District Court and in holding that the suit was one to establish a claim seeking to declare and enforce a promise to pay money and was not for an interest in California lands, did not decide a question of California law contrary to and in conflict with any applicable Califolnia court decisions. The Texas court had jurisdiction.

II. Argument on motion to transfer:

Asking a writ in a petition which concludes with the assertion (p. 23) that "the failure of the District Court to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision," petitioner occupies a position, assuredly a novel one in this Court, of having failed to even bring up that part of the appellate court record of the hearing on the motion to transfer in the District Court showing the factual predicate for action in both such courts. How else could such a charge of flagrant abuse of discretion be examined? Respondents might have contended themselves with leaving petitioner in such a predicament, but have preferred instead to secure a certification by the Court of Appeals under Rule 21, par. 6, and that original record is now before this Court.

Petitioner, in invoking the exercise by this Court of its supervisory jurisdiction, does not assert that

the judgments below on the merits were wrong or show that a different result would have been reached had the case been tried on its merit elsewhere. It has not attempted to show that the case was not fairly tried on the merits, or that petitioner was denied opportunity to develop all its defenses or otherwise prejudiced.

This Court does not deal in abstractions.

This Court is not one for correction of errors in fact-finding and will not review concurrent findings by two courts below absent "a very obvious and exceptional showing of error." The only evidence in support of transfer which movant below offered was strongly contradicted and substantially impeached. The trial court resolved all factual disputes against movant.

"Unless the right to choose between conflicting facts or assertions exist, the (trial) court could never determine a motion under this section (1404(a)) *on the facts.*"

As said by this Court in *Norwood*, the relevant factors have not changed, and plaintiff's choice of forum is still to be considered. As recognized in that case, *Gulf Oil v. Gilbert* has been qualified only to the extent of investing a broader discretion in the trial court so as to permit its grant of transfers upon some lesser showing of inconvenience, but *Norwood* only reconfirms that upon being confronted with such a motion it must exercise "discretion" according to the facts before it in each particular case. When disputed, it remains the function and unavoidable duty of such trier of the facts to resolve such a dispute.

In accordance with "the accepted and usual course

of judicial proceedings" disputed facts on this motion were resolved after a lengthy hearing in the court of first instance, and the Court of Appeals with that record before it declared it found no indication that the trial court had abused its discretion. Every factor held relevant under 1404(a) was weighed.

Normally the parties are entitled to an adjudication of their rights in the tribunals which Congress has empowered to act, and Congress having opened the Federal Court to suitors in diversity cases involving the requisite jurisdictional amount, a plaintiff is not to be lightly deprived of his choice of forum.

While normal appropriate venue may sometimes operate "vexatiously," such must be proved as any other ultimate fact, and the resolution of such a dispute is peculiarly within the province of the court who heard the witnesses, observed their demeanor, and could consider their credibility. That a trial of the case in Texas would *not* operate vexatiously on petitioner or impose needless hardship has been determined against petitioner.

Petitioner's earlier intimation and recent charge that respondents engaged in "forum shopping" was disproved and also determined by a finding for respondents on all facts. Such evidence showed among other things that an expeditious trial and disposition of the case might be obtained in the Texas court and on appeal to the 5th Circuit, and that a contrary condition existed in the California Southern District and 9th Circuit, and that such had an important bearing on respondents' choice of forum.

The Texas cases and opinions of the 5th Circuit

are replete with references to California decisions, and vice versa, and it has been shown and cannot be seriously contended that the law of California on contracts is either unique or substantially different from contract law in Texas or elsewhere. Relevant factors in the place of trial on a personal injury case have obvious distinctions from an action based on a breach of written contract where tried by a court without a jury.

The petition for writ of certiorari should be denied.

* * * * * *

ARGUMENT

The Claims Asserted and the Relief Sought By Respondents in This Suit against Petitioner and the Relief Granted Were Subject To the Jurisdiction of the United States District Court in Texas

There being no dispute in this case concerning diversity of citizenship or the amount in suit, the question here is whether or not the District Court in Texas had jurisdiction of the subject matter. Whether such court had jurisdiction of the subject matter is controlled by the "gravamen of the action" and its "essential features," which are to be determined from the allegations in the complaint and the relief sought. *Stone v. U. S.*, 167 U. S. 178 (1896).

While no close question is presented here under allegations of a complaint seeking only to establish and enforce against defendant its promise to pay money, in order to answer petitioner's argument on local and transitory actions and its cited cases we will first distinguish such cases and show that the federal courts and those of Texas and California have many times held actions "transitory" in even close cases in which claims not directly affecting the land have been regarded as "incidental."

On examining the complaint in *Stone* this Court found that the "gravamen of the action" was the conversion of the lumber and ties made from the trees taken from the Government land, but that a personal judgment for the property so converted was sought,

and that no judgment was asked on account of the trespass, and that its transitory nature persisted despite the introduction of an issue at trial as to the ownership of the land. This Court in that case distinguished *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105 (1894), relied on by petitioner in the instant case, because, as shown by the allegations of the petition in Marietta, "the trespass upon the land was the principal thing, and the conversion of the property was incidental only."

We have no such action ex delicto[15-a] as was before the court in *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811) relied on by petitioner, in which Chief Justice Marshall examined a case in trespass q.c.f. and reluctantly held it local in nature after recognizing that the rational distinction between local and transitory actions is the distinction between an action *in rem* and one *in personam*.

Guarantee Trust v. Delta & Pine Land Co., 104 F. 5, and *Boyce's Executors v. Grundy*, 9 Pet. 275, also cited by petitioner, are inapplicable in the instant

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[15-a] As confessed in the petition (p. 10), "as against petitioner the suit sounds in contract." Ours being an action on contract, *Livingston* is inapposite under distinctions there drawn. See Note, "Jurisdiction of action at law for damages for breach of contract, or for tort concerning real property in another state or country," 26 L.R.A. (N.S.) 928, 933-4, pointing out that Marshall, C. J., observed in *Livingston* that under English common law (by which he felt the jurisdiction of the U. S. trial courts should be determined because the Congressional grant of jurisdiction was that of courts "at common law") the forum "took jurisdiction of . . . all contracts, wherever executed even contracts respecting lands that were in fact situated beyond the realm," and had in making such distinction said: "It is admitted that on a contract respecting lands, an action is sustainable wherever the defendant may be found."

case.[15-b]

Where, as here, the complaint only declares that the defendant has given his promise in a contract to pay money, which should be established and enforced against him so that an accounting may be had as such sums become due, and in which no other relief is sought, the "gravamen of the action," whether considered for jurisdictional or venue purposes, is personal and transitory in nature and results in only a judgment *in personam* as held by that same great Chief Justice in *Massie v. Watts*, 6 Cranch 148 (1810) and that such an action may be maintained wherever jurisdiction over the person of the defendant can be had.

Since time out of mind, such has been the rule in both the United States courts, 1 *Moore's Fed. Prac.*, Sec. 0.142(2.-1), and in the several states, including California and Texas. *Platner v. Vincent*, 187 Cal. 443, 202 P. 655 (1921); *Hall v. Jones*, 54 S. W. 2d 835 (Tex. Civ. App., 1932, *err. ref.)*[16].

[15-b]In *Delta & Pine* the 5th Circuit correctly held that a federal court in Tennessee lacked jurisdiction to order a judicial sale of Mississippi land, although recognizing the jurisdiction of such a court under *Massie v. Watts* to enter an *in personam* decree. Plaintiff's title in the later Mississippi suit to remove cloud depended on a deed executed pursuant to the Tennessee decree to which the Mississippi defendants were not parties.

The distinguishing features in *Grundy* were afterwards clearly pointed out by Judge Sanborn in *Byrne v. Jones*, 159 F. 321, 328 (8th Cir. 1908): In a Tennessee suit the court, after ordering a contract concerning Mississippi lands rescinded, rendered a personal money judgment against Boyce, who owned the Mississippi lands and then attempted to fix a *lien* upon such lands and ordered them sold, which this Court understandably held an act beyond the jurisdiction of the Tennessee Court.

[16]That the rule is the same in both Texas, the forum state, and in California, where the contract was made, appears in an important recent case by the Texas Supreme Court, *McElreath v. McElreath*, 4 Tex. Sup. Ct. Journal 440, of April 22, 1961, opinion delivered on motion

After expressly confirming the rule that resort must be had to the averments of the complaint and the character of judgment which may be rendered to determine the transitory or local nature of an action, a California District Court of Appeals in *Work v. Assoc. Almond Growers*, 245 P. 790, 791 (1926), said:

> "It is manifest from a reading of the complaint that the only relief sought is a money judgment. An action which has for its object the mere recovery of money is essentially an action for debt, and therefore transitory and not local."

In *Platner*, supra, the Supreme Court of California held that an action of covenant founded on privity of contract is transitory even though the covenant sought to be enforced against one of the "joint and several obligors" also ran with the land in the state of Washington, pointing out that any investigation into the title of the land described in the deed was only "an incident to the main inquiry or complaint," and that it was not a suit for land, and went on to quote from and expressly agree with a leading case by the Illinois court, *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73 (1894), stating the rule:

> "Where the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate * * * The

for rehearing April 19, 1961, in which the court, in considering whether or not the Texas court would enforce an Oklahoma judgment directing defendant to execute a deed to Texas land, looked to and expressly approved the California rule as stated in *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 214 P. 2d 844 (1950), in which that court had ordered a stay of California proceedings pending final determination of an existing suit in Texas, which in part involved the rights to California land and in which the California court had observed: "The courts of Texas are as competent to administer justice as those of California."

> court, having the parties in interest all before it, may proceed, although the land to which the controversy relates may lie without the jurisdiction of the court."

As held by the California Supreme Court in a leading case, *Neet v. Holmes*, 19 Cal. 2d 605, 122 P. 2d 557, 560 (1942)[17]:

> "The principal relief sought by the plaintiffs is an accounting of operations in the leased property and in the additional twenty mines located by the defendants, and a judgment based on the fruits thereof, including title to the additional mines, of which the plaintiffs have been deprived by the alleged fraud of the defendants. Such an action is a proceeding in equity and is essentially a personal action."

In contrast, as later pointed out in that opinion:

> "The nature of the action is local, and must be tried in the county where the land is situated where it turns on the title to property as distinct from the personal obligation, and the decree operates *ex proprio vigore* on the title." *(Ibid.)*

In California, as in Texas, it is held that while a judgment or decree rendered in one state cannot of itself *ex proprio vigore* directly affect title to lands in

[17]In 1957 cited and quoted at length as being "the most recent expression of the California Supreme Court upon this subject" in *Miller & Lux, Inc. v. Nickel*, 149 F. Supp. 463, 465, by the U. S. District Court California S.D. after an extensive review of the authorities beginning with the distinction between local and transitory actions as declared in *Massie v. Watts*, "where the defendant in the original action is liable to the plaintiff . . . in consequence of contract . . . the principles of equity give a court jurisdiction, wherever the person may be found," and concluding that the classifications in the California courts are compatible with the Federal authorities.

another, this does not mean that jurisdiction is lacking to enter a decree in equity acting upon the person of the defendant who is before the court which declares the rights between them or to compel specific performance of a contract to convey land situated in another state. *Redwood Inv. Co. v. Exley*, 221 P. 973 (Cal. Dist. Ct. of Appeal, 1923), cited and quoted from with approval by the California Supreme Court in 1957 in *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P. 2d 11, 16 (1957).[15]

In the case last mentioned the California court in declaring and following the rule "in the majority of the states" includes citations from Texas including *Hall v. Jones*, cited supra, in which the Texas court had earlier cited *Smith v. Davis*, 90 Cal. 25, 27 P. 26 (1891), where the California Supreme Court, following the principles of *Massie v. Watts*, held that the California court had jurisdiction to enforce a trust instrument "relating to certain lands in Washington Territory."

As said in a recent case by the 6th Circuit, *Gulf Oil Corp. v. American Louisiana Pipe Line Co.*, 282 F. 2d

[15] *Rozan* was a divorce action in which the court disposed of a contention that the judgment "directly affects the title to land in another state (oil lands in North Dakota) and therefore exceeds the court's jurisdiction," and that "a court of one state cannot directly affect or determine the title to land in another." The trial court had determined that the North Dakota properties "were acquired with community property and money" and had declared in making a property division that, as between the husband and wife, she was entitled to a specified share therein, and the Supreme Court of California affirmed such judgment "to the extent that it declares the rights of the parties before the court." After the husband acquired the North Dakota property and pendente lite, he divested himself of title by conveyances to his nephew (who was not made a party), and the Supreme Court properly modified the judgment below by striking that part of same wherein the trial court had attempted to enter a judgment declaring such conveyances to be a nullity and to *ex proprio vigore* vest title in the wife because directly affecting the title to such foreign land.

401 (1960):

> "The principal action was not *in rem*, but was to declare that the action of a party, in canceling a contract, was unlawful. The order of the court would operate against the party. This action, therefore, was transitory and not local in nature."

Having noticed in *Hall* and *McElreath* that the rule is the same in the Texas forum, we cite *Milner v. Schaefer*, 211 S. W. 2d 600 (Tex. Civ. App., 1948, *err. ref.*), approved 1961 in *McElreath*, in which a Texas court held a Colorado *in personam* judgment *res adjudicata* in Texas to fix and declare the rights between the parties to Texas real estate.

"What Is This Case?"

It is essential, in the course of affirmatively stating the nature and scope of respondents' claims in the instant suit against petitioner and in considering what right was conferred by the 1943 contracts, to also establish what is *not* claimed in such suit and what rights were *not* conferred on respondents under such contracts.

As shown by our previous "Statement" of allegations in the complaint, prayer, and decree, the nature of respondents' claim, viz., the "gravamen of the action" and its "essential features," was only to establish and enforce petitioner's promise in a contract to pay money and for an accounting. By the authorities previously reviewed such is the only proper way to

determine the nature of respondents' claims.[19] Our decree went no further.

It appearing in such complaint (as well as in the contract and by the findings and judgment below) that the promise which petitioner made was a "joint and several" one, in legal concept *three* contracts were created: one between the promisee and the first promisor, a second between the promisee and the second promisor, and a third between the promisee and both promisors. 2 *Williston on Contracts*, par. 320. Upon such a promise, it is unanimously held that a promisee may sue on either of the three contracts. Respondents elected to sue Twentieth Century to enforce its "several" promise alone, as it was authorized by law to do, and Fox Realty was not an indispensable party.[20]

[19]As recently held by this Court in *Pan American Pet. Corp. v. Superior Court of the State of Del.*, 29 U. S. L. Week 4477 (U.S., May 29, 1961), in determining whether or not a federal question was presented: "The answers depend on the particular claims a suitor makes in a state court – on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, the complaints in the Delaware Superior Court determined the nature of the suits before it."

Also, as determined by this Court in 1957 in *Smith v. Sperling*, 354 U. S. 91, in the course of determining federal diversity jurisdiction and whether or not there should be a realignment of the parties destructive of diversity, the proper course is "to determine the issue of antagonism on the face of the pleadings and by the nature of the controversy."

[20]*Camp v. Gress*, 250 U. S. 308 (1918). So expressly held in a suit for declaratory relief to enforce the rights under a contract made "jointly, severally and *in solido*". *T. & P. Ry. Co. v. City of New Orleans*, 159 F. 2d 77 (5th Cir., 1947). Repeatedly so held by the California courts:

In *Platner v. Vincent*, supra, 202 P. at p. 657, its Supreme Court found no defect of parties in a suit against only one of the joint and several obligors where it appeared from the complaint that the obligation sued on was "joint and several," and said: "From which it follows that defendant was severally liable and could be sued alone." When *Platner* was again before that court, 229 P. 24, 27 (1924): "The wife, being a joint and several obligor, could be sued alone. *Platner v. Vincent*, supra; *Holzheir v. Hayes*, 133 Cal. 456, 65 Pac. 968. The case last cited goes to the extent of holding that Sec. 1113, Civil Code, imposed a *personal* obligation on the grantor and is binding on one of

Since Fox Realty Corporation of California was not sued, it becomes unnecessary to consider either what sort of complaint might have been filed against it or any question concerning whether or not its joint and several promise could be construed to also operate against that corporation as an equitable assignment by it of an interest in the land.[21]

It was petitioner's personal promise that it would pay to the promisees in such contracts on the 20th day of the second calendar month after the month during which another corporation was paid by any lessee a sum of money equal to and measured by a specified fraction of those receipts. While it is true that petitioner's obligation to pay was to be in "an amount equivalent to" a specified percent of certain proceeds which another one of the "joint and several" corporate obligors was expected to receive in consideration for the leasing of the lands owned by the latter corporation, such promise on the part of petitioner was a far cry from and did not give to promisees any interest in such proceeds as such, nor did it designate a fund out of which such payments were to be made and did not confer upon promisees any interest in the oil or gas either before or after severance. It was no more than a yardstick.

In return for such "joint and several" personal cov-

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them, although he may have *no interest in the land* at the time of the execution of the grant." (Emphasis added).

As put by a California District Court of Appeal in *Williams v. Reed*, 248 P. 2d 147, 153 (1952): "When the obligation is *joint and several*, it is not nonjoinder to sue one alone" (citing cases).

The rule is the same in Texas. 32 *Tex. Jur.*, "Parties," par. 24, p. 43.

[21]Both contracts when read as a whole evince a lack of any such intention and contain express clauses for the giving of a deed in a prescribed form, which preclude any implication arising that such was the intention. (See ante, p. 14).

enants, promisees, as already shown, parted with all of their former rights, titles and interests in the land and in any minerals which might be thereafter produced therefrom. Such surrender was effected by releases, assignments and a deed, given *not* to petitioner but to the subsidiary corporation, and absolute title, both legal and equitable, passed to Fox Realty.

When it is recalled that petitioner in 1927 had parted with the title to the only tract which it ever owned, and because it owned no interest in any of the lands or minerals at any time thereafter, it is plain to see that it could have conferred on respondents no interest in or claim to either minerals or any proceeds from any later leasing of the land. It is, for this reason alone, inconceivable that petitioner's promise could have operated as an equitable assignment of any such interest.

Although it is unnecessary to do so in the absence of any asserted claim against Fox Realty Corporation of California, we next notice that the promise of that corporation created no more than a personal obligation on its part to pay money in an amount which was to be measured by, viz., "an amount equivalent to," a part of its receipts from future leasing, which would only become due and payable on the 20th day of the second calendar month after receipt by it. But Fox Realty did *not* in such contracts agree that promisees should have and own a share in any of the leasing proceeds as such, nor was a fund created out of which such payments were to be made.

One can suppose a case in which a vendee has given his vendor a contemporaneous contract containing promissory language coupled with an assignment or

given under factual circumstances showing an intention that the instrument should operate as an assignment or create a lien, but even then, in a later suit between them, the cause of action could be so cast as to assert only a transitory action to enforce the vendee's promise to pay without more, and the fact that the forum had no jurisdiction of the *res* would not deprive it of jurisdiction to grant *in personam* relief.[22]

Respondents could have sued Fox Realty as the other "joint and several" obligor, but did *not*. In the suit which respondents did file they could have asserted (although without warrant under the contracts) a claim to the lease proceeds as such, although petitioner owned *none* of them. Respondents might have asserted in the complaint (without warrant) that they owned a "royalty" or that a lien should be placed upon and enforced against a part of the oil and gas production, but such was not alleged, and no such relief was sought or granted.

[22]See notes: "Jurisdiction of equity over suits affecting real property in another state or country," 69 L.R.A. 673, 691; "Right of Vendor in Executory Contract for Sale of Realty to Maintain Action for Specific Performance where Land is Situated in Another State or Country," Ann. Cas. 1912-C, p. 539; "Jurisdiction of action at law for damages for breach of contract, or for tort concerning real property in another state or country," 26 L.R.A. (N.S.) 928, supplemented 44 L.R.A. (N.S.) 267.

In *Peninsula Trading & F. Co. v. Pac. Steam Whaling Co.*, 123 Cal. 689, 56 P. 604 (1899), where there was a claim *inter alia* for an accounting under a contract prescribing how proceeds from an Alaska salmon cannery were to be divided, the trial court's action sustaining demurrer for want of jurisdiction over the subject matter and of dismissal was reversed by the Supreme Court of California: "The facts alleged may be such as to entitle plaintiff to a larger measure of relief, if the action were pending in the courts of Alaska (where the land was), than can be awarded in . . . San Francisco, but the latter court is not for that reason deprived of jurisdiction to grant such relief as may be within its power."

Principles of Peninsula reaffirmed by Cal. Sup. Ct. in *Promis v. Duke*, 208 Cal. 420, 281 P. 613, 616 (1929), and in *Tully v. Bailey*, 46 Cal. App. 2d 195, 115 P. 2d 542, 545 (1941), approved in *Rozan, supra*.

In the petition it is stated (p. 11):

> "The pertinent inquiry is not to a characterization of the nature of petitioner's interest in the suit, but rather to the nature of respondents' interest and the necessary impact of the suit upon the real property rights of Fox Realty."

But, as held in the cases previously cited, in deciding jurisdiction *vel non* the nature of the claim in the complaint and its prayer for relief are determinative. The relief sought and granted against petitioner "does not require the court to deal directly with the estate itself," and did not therefore "affect real estate" under the test laid down by the California Supreme Court in *Platner v. Vincent*, supra. The decree asked for and granted did not "operate ex proprio vigore upon the lands in another jurisdiction to create, transfer or vest a title" and was therefore not a local action, as held by the same court in *Smith v. Davis*, supra and in *Neet v. Holmes*, supra.

Under such contracts, respondents had and asserted no cause of action against the lessee, Universal Consolidated Oil Company, and its rights and obligations as lessee remain wholly unaffected. All rights of Fox Realty as lessor to have such lessee fully perform its obligations under such lease and to retain the benefits therefrom remain unimpaired.

That the officers of such subsidiary corporation may lament the fact that the parent company will be forced to keep its promise made in 1943 to pay to respondents sums equal to and measured by a part of that lessor's receipts will be only an indirect and irrelevant consequence of an enforcement of the decree below. In an

effort to ascribe an "impact" upon "the real property rights of Fox Realty," it is the argument of petitioner, without saying so, that the separate corporate entities should be disregarded. But in the next breath petitioner insists that Fox Realty is an "indispensable" party whose joinder would destroy diversity, necessarily insisting that petitioner and Fox Realty are separate corporate entities.

In the petition (pp. 12, 9) it is said that respondents "acquired an interest in oil and gas" and have been "awarded" one-half of the so-called "variable participating royalty," but as has been shown neither statement is correct. On the contrary, by that part of the decree which the Court of Appeals affirmed, the judgment below determined, fixed and declared *only* the rights of respondents to be hereafter paid by the petitioner and the duty of such petitioner under such contracts to hereafter pay to such respondents, according to their respective interests, "sums and amounts equivalent to" 50% of any and all sums and amounts which may be hereafter received by Fox Realty as lessor under its lease to Universal "on account of or under those provisions of such lease which provide for the payment by such lessee to lessor of a 50% net profits interest and which is referred to therein as being a 'variable participating royalty'." (Decree quoted ante, pp. 8-9).

The claim here asserts against the petitioner only those rights arising under the 1943 contracts, and it is not necessary or material in the instant case to inquire or determine what the character of the rights or of the respective estates of an oil and gas lessor and lessee were under California law when the lease to

Universal was given nine years later. It is utterly immaterial to the present inquiry that the courts of California do not accept the theory of the ownership of oil and gas in place, or that they have characterized the interest of an oil and gas lessee as being "an interest or estate in real property in the nature of a profit a prendre, which is an incorporeal hereditament."

Of importance here is the fact that it was the 1943 promise of petitioner to respondents that any later actual receipts by its subsidiary corporation as lessor were to be the measure of its own obligation to pay two months later.

Petitioner's assertion (p. 10) "that the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property" is not supported by the California cases which it cites.

Under a heading "Reasons for Granting the Writ" it is the primary assertion in such petition (p. 10) that respondents in this suit claimed an "interest in the proceeds from California oil and gas production," and that the courts below have decided "in conflict with applicable California decisions" that such a claim did not assert "an interest in real property." No such "claim" was made by respondents, as appears from the complaint. Neither of the courts below so "decided" and no such question was before them. We now leave behind this false premise in order to show that none of the seven cases cited by petitioner (pp. 11-13) support the further statement (p. 10):

"The transcendent fact is, however, as we will

> show, that the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property."

In none of the California cases cited anywhere in such petition was the plaintiff seeking to recover against a stranger to the title.

In none of such suits was plaintiff's claim limited to a simple demand for the enforcement of a contract to pay money based upon mere privity of contract as distinguished from privity of estate.

No case has been presented in which A was seeking to enforce B's promise to pay money in an amount equal to and as measured by C's future receipts.

None of such California cases involved any question of jurisdiction or whether the action was local or transitory or any asserted defect of parties.

Five of them (all but the tax case, *County of Los Angeles v. Continental Corp.*, 113 Cal. App. 2d 207, 248 P. 2d 157 (1952), and *Taylor v. Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959), were suits to establish rights either granted or reserved in actual conveyances or assignments against other parties in privity of estate. *In each case (except the tax case) the claimant was asserting that he had an interest in land.*[23]

[23]In *Callahan v. Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935), the California Supreme Court said:

> "The question to be determined in the instant case is as to the nature of the rights of the purchaser of the oil royalty interest." (loc. cit., p. 791).

Defendant Martin had been conveyed by deed from the landowner "3% of all oil, gas and other hydrocarbon substances" in a tract of land then under an oil and gas lease. Grantor in that deed afterwards

conveyed to plaintiff's predecessor in title his interest subject to "conditions, restrictions, reservations, easements, rights and rights of way of record." After the original lease had terminated and a new lease had been granted, plaintiff brought suit to quiet title, claiming that the conveyance to defendant expired with the original lease. The court held:

> "The assignments of oil royalty to the defendants Martin herein by plaintiff Callahan's predecessors in ownership of the general estate in the land, vested in the Martins an estate in real property described in plaintiff's complaint, and the recordation of the assignment charged plaintiff with constructive notice thereof."

Such holding was that a deed to California oil and gas royalty conveys a perpetual interest in real estate, though not an interest in the oil and gas in place.

Callahan has no application here because (1) each of the parties in that case claimed an interest in the land, one under a royalty deed and the other under a deed to the fee, and (2) there the claim was upon privity of estate, but here it is based on privity of contract and the owner of the estate is not a party.

In the tax case, *County of Los Angeles* v. *Continental Corp.*, 113 Cal App. 2d 207, 248 P. 2d 137 (1952), the County sued to establish that the rights of Continental under a contract with Los Angeles County Flood Control District, the owner of the land, granting Continental exclusive right to drill for and produce oil and containing "substantially all of the provisions usually found in the form of oil and gas lease customarily employed in this area" constituted "an oil or gas lease or vests in the defendant a possessory interest in real property subject to taxation." The court held: "The court is satisfied that the interests vested in the defendant thereunder are clearly comprehended by Section 107 of the Revenue and Taxation Code and are properly taxable thereunder." This holding answered the only issue posed by that court (op., p. 163).

This tax case is inapplicable here because the court found that the contract examined was under its terms in substance and effect an *ordinary oil and gas lease* which conferred *possessory* rights requisite to the application of that particular taxing statute.

In *Recovery Oil Co.* v. *Van Acker*, 79 Cal. App. 2d 639, 180 P. 2d 436 (1947), the assignee of an oil and gas lease on government lands sought to quiet his title against an assignment by his predecessor of "the proceeds from 15% of the oil, gas and other hydrocarbon substances produced, saved and sold . . . until such time as said assignee shall have received the sum of $20,000.00." The plaintiff had his assignment with notice, and the court held that such assignment was binding upon plaintiff. In the later appeal of same case, *Recovery Oil Co.* v. *Van Acker*, 96 Cal. App. 2d 909, 216 P. 2d 483 (1950), the court affirmed its previous holding and said: "Any obligation to pay was not only a continuing one but she (the owner of the oil payment had an interest in land which did not terminate until she actually received that amount of money."

Van Acker has no application because (1) defendant as owner of

an oil payment was claiming an interest in land and (2) was relying upon privity of estate and not privity of contract.

In *Schiffman* v. *Richfield Oil Co. of California*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937), defendant's predecessor, while the owner of an oil and gas lease, had "assigned to plaintiff stated percentages of the proceeds to be 'derived and received . . . from the sale or other disposal of sixty-six and two-thirds (66-2 3) percent of the net production' " from an oil well after payment of expenses. Plaintiff sued defendant as the assignee of such lease for an accounting. Defendant contended that plaintiff's assignment created only a personal obligation and did not give plaintiff any interest in the oil produced after his grantor had assigned the lease. Plaintiff contended that his interest amounted to an interest in the leasehold estate under *Callahan* v. *Martin*, but the court expressly declined to determine whether or not plaintiff had an interest in the leasehold estate and instead "assumed for purposes of this decision that plaintiff does *not* have an interest in the leasehold estate as such" (loc. cit., p. 1088) and decided on equitable principles that defendant, taking the lease with notice, was bound.

The Supreme Court in *Shiffman* affirmed the judgment of the trial court but struck out the findings made below that the plaintiff had an interest in the leasehold estate or in the oil produced prior to sale.

In *Taylor* v. *Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959), as a result of a prior controversy on lease development the earlier lessee quitclaimed to lessors his interest in the undeveloped portions of the lease in consideration for "5% of the proceeds, less the pro rata share of the operating costs, hereafter realized from the sale of all oil and gas produced and saved from the first two wells" that might be thereafter drilled. Wholly foreign to any issue here, the question before the court was whether the receiver of a partnership, which later drilled the two wells, was entitled to sell such 5% interest as a part of the partnership assets. In *Taylor* the interest asserted was in the proceeds *as such*, and privity of estate was claimed.

In *Chase* v. *Trimble*, 69 Cal. App. 2d 44, 158 P. 2d 247 (1945), the court was not called upon to consider, nor did it discuss, the effect of the only language quoted in the petition (p. 13), which was the royalty provision in the oil and gas lease. The sole question presented was whether or not a reservation of an overriding royalty in a later assignment by lessee survived the still later quitclaim of the leasehold. The court held: "Appellants' overriding royalty interest, not entitling them to co-tenancy and limited, as it was, to the duration of the lease, expired when their assignee executed and delivered the quitclaim to the landowner-lessor."

La Laguna Ranch Co. v. *Dodge*, 18 Cal. 2d 132, 114 P. 2d 351 (1941), is only different from *Chase* in that the overriding royalty was there carved out and sold and assigned by the lessee, whereas in *Chase* it was reserved by the lessee in the course of assigning the working interest. Both were actions by the landowner to quiet title against the owner of the overriding royalty after the oil and gas lease had been quit-claimed, and in each the decision of the court was that the overriding royalty interest had terminated with the lease. The language

Obvious distinctions in the claims asserted and character of instrument examined render such cases inapplicable here. Again recalling that the question of jurisdiction over subject matter is determined by the scope of the claim asserted even though the instrument relied on may confer additional rights not asked to be enforced, it is a complete answer to say that in none of such California cases was the claim one to enforce as against petitioner, a stranger to the title, only its promise to pay money in an amount equal to and measured by another's future receipts.

Despite this, in order to meet head-on petitioner's assertions concerning the full scope and character of contract rights conferred on promisees in the instant case, we have gone on to distinguish its cases to show that in none of them was the court construing contracts like ours, and that in none of them was it decided that such a contract conferred on promisees an interest in land.

A reading of petitioner's cases (analyzed and distinguished in the footnote) will exhibit that the California courts have treated with discrimination the facts in each case presented and limited their holdings precisely to the issues as joined, and that contrary to petitioner's assertions none of such holdings conflict with the holdings of the courts below in the instant case.

quoted out of factual context in the petition (p. 13) in *La Laguna* appears in the court's comparison of the rights created under a grant of an overriding royalty by a lessee with those under a grant of a royalty by the landowner and conclusion that the rent analogy was applicable to the lessor's royalty but inapplicable where the operating lessee later grants an override.

Chase and *La Laguna* have no application here. In each of such suits by the landowner to quiet title the defendant holders of the override relied upon privity of estate, and the court held that such privity had terminated with the lease.

Holdings of Courts Below That the Rights Asserted by Respondents against Petitioner In this Suit Were of a Personal Nature and Not for an Interest in Land Are Consistent With and Supported by the Holdings of Both the California Courts and Elsewhere

There are precise holdings by the courts of California and elsewhere in which it has been held that *contracts containing promissory language like that found in the 1943 contracts*, viz., a promise to pay "an amount equivalent to" receipts, proceeds or profits, creates only a general obligation to pay money to the promisee as a creditor. This is held true even in a suit brought against the one in possession of and claiming ownership of the proceeds or fund comprising the yardstick. Respondents' contract rights here sought to be enforced have been held *not* to create any interest in land or in proceeds or profits as such, in the following cases: *In re Broome's Estate*, 166 Cal. App. 2d 488, 333 P. 2d 723 (1958); *Bullen v. De Bretteville*, 239 F. 2d 824 (9th Cir., 1956); *Byrd-Frost, Inc. v. Elder*, 93 F. 2d 30 (5th Cir., 1937), *cert denied*, 303 U. S. 647 (1938); and *Fechteler et al. v. Palm Bros. & Co.*, 133 F. 462 (1904).[24]

[24] *In re Broome's Estate*, 166 Cal. App. 2d 488, 333 P. 2d 723 (1958) involved a covenant in a deed in which the grantee had agreed to "*account for and pay* to said parties of the first part (the grantor) *an amount equivalent to* one-half (1/2) of all the royalties or other compensation which may become payable to or be received by or for the account of the grantee, its successors or assigns, for any oil, gas, etc. which might be developed on the California lands specified. The grantor in that deed died and by the terms of his will left all of his "interest in real property" to his daughters and the rest of his estate to a trust under which his wife was the income beneficiary for her life. This appeal was from an order settling the report of the trustees of the estate, and the adverse claimants were the daughters claiming the real estate and the widow claiming the personal property, and the issue was "whether or not a real property right was excepted and reserved in favor of the grantors in the original deed" and "whether

or not a personal right was reserved in favor of the grantors in said deed." The court considered the California cases, including *Callahan v. Martin*, supra, which held that a royalty was an interest in land, but then pointed out that the grantor in the instant case had vested in the grantee the full leasing rights "requiring the grantee to agree to pay to grantors, their successors and assigns, an amount equivalent to one-half of whatever might be received for any oil . . . So viewed, the obligation to pay is in the nature of a perpetual *contractual* obligation imposed upon the owner of the land by reason of the ownership thereof." The court held that the moneys paid and to be paid under such personal covenant passed under the will of the decedent grantor as personal property rather than as an interest in real estate, and that such covenant created no interest in the realty.

Bullen v. De Bretteville, 239 F. 2d 824 (9th Cir., 1956), was a case for distribution of funds paid into court upon the condemnation of land by the United States in a prior case, and in this last case the only question that remained was between the private claimants to the fund. Since the funds stood in lieu of the real property interests condemned by the U. S., the court was called on to determine whether each claim presented constituted an interest in the real estate or was secured by a lien. Appellants Bullen and Hayward had each advanced $2,500.00 for the drilling of a well under a letter providing that they were to receive "one percent (1%) participating royalties, and (by the terms of a 'two for one agreement' combined therein) receive double their investment, or $5,000.00 each, 'out of the 1st 15% of production from the well'." Trial Judge Yankwich had sustained appellants' claim to the 1% participating royalty, but had denied their claim for $5,000.00 each on the ground that the "two for one agreement" "created only a personal obligation", was not specifically enforceable out of obligors' royalty interests, and was therefore barred by the four year statute of limitations. (239 F. 2d at 828).

In affirming, the 9th Circuit considered the question determinative of appellants' claim to $5,000 each to be: "Was the $10,000 a personal obligation to pay or was the promise secured?" (*Id.*, 830, ¶ 10)

Appellants contended first that the California cases (*Callahan v. Martin, Schiffman v. Richfield*, and *Recovery Oil Co. v. Van Acker*, also cited by petitioner in the instant case) were controlling, but the court pointed out that they were inapplicable because they involved "factual situations where an actual assignment existed, either outright or as security, or where an equitable lien had been created."

Appellants next contended that the contract should be regarded as an agreement to assign, and as such would create a legal interest in oil rights. The court rejected this contention, saying that here there was but an indefinite reference to documents which might be drawn in the future, and that this was not "the sort of agreement where all the necessary terms are agreed upon and all that remains is the execution of a written memorial." (*Id.*, 831)

Appellants further contended that even if the document is merely an agreement "which did not pass present title, it would, nevertheless create rights in the property which would be enforceable in a court of equity." The court rejected this argument, saying:

"The instant case concerns the *rights* of a contracting party, not the *duties* of an assignee. * * *

"Appellants make one final valiant effort. They urge that

'under the decisions where money is to be paid with funds "arising from" the production of land, or is to be "paid out" of such production * * * the document, *as a matter of law*, is to be interpreted as giving a security interest in the land and the production therefrom.

We cannot agree." *(Ibid.)*

later noting that:

"There must be something more than a contract which has been breached before a court can impress an equitable lien upon a specific fund." (*Ibid.*, ¶ 12)

The court then held:

"We conclude that the promise to pay was personal only."

and that, since it agreed with the trial court that the "two for one agreement" was "a mere personal covenant," the complaint was barred by limitations. (*Id.*, 832).

In *Byrd-Frost, Inc. v. Elder*, 93 F. 2d 30 (5th Cir., Tex., 1937), *cert. denied*, 303 U. S. 647 (1938), the court was called upon to distinguish between a personal obligation to pay money and an assignment of proceeds as such. At a time when Byrd-Frost and Elder were in pending litigation, each adversely claiming title to an interest in certain minerals, both conveyed their interest to Mazda Oil Co. and executed an agreement whereby Byrd-Frost would collect the royalties from Mazda and, should Elder be adjudged owner of said interest, Byrd-Frost would pay a "*sum equal to the amount of money collected*" to Elder. Elder won the suit and demand was made by him on Byrd-Frost for payment of a sum equal to the amounts received by it, which was refused.

Thereafter, a stranger to the previous litigation, Miller, instituted trespass to try title in a state court against both Byrd-Frost and Elder and obtained a temporary injunction restraining Byrd-Frost from disposing of any of the moneys in its hands arising from the production of oil from the tract. Elder then sued Byrd-Frost in the Federal Court to enforce its previously described contractual obligation to pay, and Byrd-Frost pleaded in abatement, asserting pendency of the Miller suit and existing injunction against it. Such plea, as well as a motion to stay, was overruled, and the judgment was for Elder and his grantees for the sum demanded.

On appeal Byrd-Frost contended that the state court in the Miller suit had possession of the *res*, viz., the fund, under the injunction and that because its jurisdiction was prior to that of the Federal Court the later proceedings should be stayed. The 5th Circuit was thus required to determine the nature of Elder's claim in the later suit in the Federal Court against Byrd-Frost, that is, whether or not such suit was for the *res* – the fund – in the possession of the state court. The court

observed:

> "The agreement rests entirely upon the promise *in personam* of Byrd-Frost to be 'bound and obligated' for a sum of money 'equal to' the amount collected by it. It is upon this personal obligation that plaintiffs here sue. They seek to recover, not a specific fund, but a general money judgment. The character of the suit is not altered by the fact that Byrd-Frost voluntarily segregated the moneys in a separate fund." (93 F. 2d at 32, ¶ 3)

The court then held:

> "This suit is not brought to recover, and does not involve the title to, land nor to any identifiable fund or other res. The only matter here at issue is the personal liability of Byrd-Frost on its obligation above quoted. Only a general money judgment is sought. The suit is therefore in personam. Pendency of the state court suit is no ground for abatement or stay." (93 F. 2d at 32-3).

In *Fechteler et al. v. Palm Bros. & Co.*, 133 F. 462 (1904), an old case from Ohio, the 6th Circuit had to decide whether or not a written agreement to pay a sum of money "*equal to,*" that is, measured by, a certain proportion of the gross profits or proceeds conferred on the promisee the right to participate in such profits or proceeds as such, or whether the right created was only that of a creditor. The firm of Palm, Fechteler & Co., a New York partnership, sued Palm Bros. & Co., an Ohio corporation, for an accounting under a written contract made by them in which each had agreed to sell to and supply the other on order at cost certain goods in which they respectively dealt, and at year's end each agreed to pay to the other "*a sum of money equal to a 'specified percent' of the total and entire gross profits* made and realized during the whole year next preceding . . . out of its entire business . . . including profits made by its branch houses." In the bill it was charged that defendant Ohio corporation had failed to pay on one of its branches. A demurrer was sustained below, and the bill dismissed.

Complainant appealed, and the 6th Circuit reversed with directions for an answer. After first holding that such suit for accounting presented a case for equity consideration, the court then disposed of the defense that such contract created a partnership, ultra vires as to the Ohio corporation. The court being called on to construe the contract and to determine what legal rights it conferred on each party in order to decide whether the engagement resulted in a partnership, after first stating that "the person sought to be charged as a partner must have an interest in profits *as profits*," but that:

> ". . . it has always been the rule that if you could show that the participation in profits was not a sharing in profits as a principal – in profits as profits of a joint business – but under an agreement by which a sum was to be received which should be equal to a definite proportion of the profits as a compensation for services or rent, or money advanced as a loan, there will be no liability as a partner. Such an arrangement would contradict the notion of a partnership, for there would be no participation in profits as a principal, no receipt of profits as profits. Upon the contrary, the relation of creditor would be made out; the amount

The principle that "ordinarily a promise to pay an obligation out of the proceeds of a specific fund is not a present assignment of any portion of the fund" was recognized by the California court in *In re Henshaw's Estate*, 68 Cal. App. 2d 627, 157 P. 2d 390 (1945). In considering whether the particular instrument before it did constitute such an assignment, the court said:

> "It is uniformly held that a contract of this nature is open to construction and interpretation just like any other contract."

and affirmed the trial court's finding "that the parties intended to make an assignment of appellant's beneficial interest, and to create an equitable lien thereon to the extent of respondent's claim." In the instant case, the findings of the court below that it was the *intention* of the parties to the 1943 contracts that respondents agreed to and did surrender all of their former rights and titles in return for a mere personal covenant to pay money forecloses the inquiry. That the *intention* of the parties is controlling and the question of whether those contracting *intended* to create only a personal obligation to pay money or to confer

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of the debt being a sum of money estimated by a certain proportion of the profits, as a mere measure or yardstick." (loc. cit., op., p. 469).

The court again emphasized this distinction later in the opinion, saying:

> "Thus, though there is to be a sharing in gross profits, it is not to be a participation in profits, as profits . . . It is an agreement to pay, not to divide as principals would do, but to pay a sum of money 'equal to' (that is, measured or estimated by) a certain proportion of the gross profits. It is evident from these considerations that the character in which the one party would receive a proportion of the gross profits realized from the other would be that of a creditor, rather than that of a principal trader." (*Id.*, p. 470).

an interest in the land, lease or proceeds is a question of fact to be determined by the lower courts, as well as one of law, has been expressly recognized in *Schiffman* (loc. cit., 64 P. 2d 1088, par. 9) and in *La Laguna* (loc. cit., 114 P. 2d 354, par. 9-11).

In conclusion, it should be said that cases in the petition (p. 15) cited principally from the 5th Circuit on Fox Realty being an indispensable party are clearly distinguished by the opinion of the same Circuit in *Estes v. Shell Oil Co.*, 234 F. 2d 847 (1956), where it said in distinguishing *Keegan* (cited by petitioner):

> "The situation here is entirely different from that involved in those cases. No mention is made either in the body of the complaint or in the prayer of cancellation, reformation or other action with respect to any written instrument or any muniment of title. The sole prayer is for a money judgment and for injunctive relief as auxiliary thereto."

In all of petitioner's cases, as in *Estes*, the courts recognize a distinction between cases "seeking directly to cancel, establish or affect directly title to lands or interests therein" and cases merely seeking a personal judgment requiring the payment of money.

In conclusion, we agree with the "Statement" of petitioner (p. 11) that "the law of California is clear" and say that its courts have been careful and precise. It is a complaint in the petition that the Court of Appeals did not discuss the California cases but its opinion exhibits that it carefully examined the California decisions (286 F. 2d at 376-7) and in passing on the jurisdiction and party issue expressly noticed

four cases cited by petitioner and one by respondents (*Id.Op.* p. 379, footnote 5).

If, as petitioner contends, the decisions of California had so plainly declared that a promise such as contained in these contracts created an interest in land, it is passing strange that Alfred Wright, who had helped draw such contracts, advised Clay that the interests that were reflected by these contracts were not royalties or mineral interests, and that the interest was merely contractural (Clay dep. p. 113), and that Clay reached the same conclusion (*Id.* p. 114-5. See also R. 1420-21 and 1433 where portions of Clay dep. read into the record *by petitioner*), and it is quite apparent that if Clay had thought otherwise he (as Universal's general counsel) would have required promisees' joinder in the lease to Universal or at least have taken the matter up with them.

Also, finally conclusive on the intention of such parties to effect a complete surrender by promisees of their former rights and interests in the lands and minerals and to substitute any return only a personal promise to pay money, is the fact that the parties in drafting the final contracts were careful to employ language and to require the contemporaneous execution and delivery of releases and assignments to effect such a complete surrender. Then rendering unmistakable such intention, it was provided that such personal covenants would expire when and if the landowner should thereafter execute and deliver a deed to such promisees, their successors or assigns, in a prescribed form under which there would then have been invested in grantee an interest in the minerals, but this was never done.

Argument in Support of Court of Appeals' Affirmance of the Action of Trial Court Denying Petitioner's Motion to Transfer

Petitioner asks this Court to exercise its supervisory jurisdiction over the lower courts asserting that it would be in the interest of justice to set aside the judgments of the lower courts on the merits and to order this case transferred for another trial in the Southern District of California.

But in seeking this writ petitioner does not assert that the judgments entered on the merits of the case by the courts below were wrong or that a different result would have been reached had the case been tried on the merits elsewhere. Petitioner does not say nor has it attempted to show that the case was not fairly tried or that it was in the Texas trial denied opportunity to develop all of its defenses and contentions or that it suffered any prejudice in the forum. It is not shown in the petition that in trial below petitioner was deprived of the right to present any testimony material and relevant to the issues in the case or of an opportunity to fully present any documentary evidence it desired.

In a case like this one where the evidence relied upon by the movant was strongly contradicted and substantially impeached and the trial judge has resolved all factual disputes against movant, will this Court now entertain jurisdiction to once again examine such a factual dispute? A negative answer is indicated under holdings like *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, where at p.

275 it was said:

> "A court of law, such as this is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. (citing cases)."

In a California case in which the trial court had granted motion to transfer under 1404(a) after resolving a fact dispute in affidavits, justification for such a course of action was made in the following language:

> "Unless the right to choose between conflicting facts or assertions exists, the court could never determine a motion under this section *on the facts.*" *U.S. v. National City Lines*, 80 F. Supp. 734, 744, (S.D. Cal. 1948), *cert denied* with an opinion by Vinson, C.J., 337 U.S. 78 (1948). (Italics by the court).

Petitioner wants to apply the holdings of this Court in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) to the instant case in such a way as to remove all burden on a defendant seeking transfer and deprive a plaintiff in a diversity action of his choice of forum and in effect confer the choice on defendant. But as pointed out by this Court, although 1404(a) has permitted courts to grant transfers "upon a lesser showing of inconvenience", this Court was careful to add that:

> "This is not to say that the relevant factors have changed or that plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

Despite the tenor of petitioner's argument, we respectfully say in the language of 1 *Moore Fed. Practice*, paragraph 0.145 (6.-1, p. 1787:

> "The burden of establishing that there should be a transfer, however, remains after 1404(a) upon the moving party, who must still make a convincing showing of the right to a transfer."

The *Norwood* decision only reconfirms that the trial court is still invested with "discretion" and when such a motion is filed is called upon to exercise it on the basis of the facts before him. When such facts are in dispute it remains the function and unavoidable duty of the trial court to resolve such dispute and determine the *facts* and such a court may not fairly be subjected to a charge of arbitrary action by the party against whom disputed facts have been resolved.

When this Court said in *Norwood* that the relevant factors had not changed or that plaintiff's choice of forum is not to be considered, it had previously considered *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and was referring to those factors held relevant including plaintiff's choice of forum as recognized in *Gilbert* and qualified since *Norwood* only to the extent of investing a broader discretion in the trial court so as to permit its grant of transfers upon some "lesser showing of inconvenience".

As has been demonstrated in our earlier statement from the record, a patient trial court in the instant case in conducting a lengthy hearing in order that disputed facts might be resolved, heard evidence on and considered all factors still relevant and to be considered under *Norwood*. The Court of Appeals with

such a record made in accordance with the accepted and usual course of judicial proceedings before it carefully considered the matter and declared it found no indication in the record that the trial court had abused its discretion.

Congress, having opened the federal courts to suitors in diversity cases involving the requisite jurisdictional amount, a plaintiff is not to be lightly deprived of his choice of forum. An occasion may arise where normal appropriate venue may operate "vexatiously" but this must be proved as any other *fact*, and where the facts are in dispute the resolution of such a dispute is a function of the trial court having the opportunity of hearing the witnesses, observing their demeanor and determining their credibility. Absent such a showing the parties are entitled to an adjudication of their rights in the tribunals which Congress has empowered to act. Under the record here, it was determined in a normal judicial way that as a matter of *fact* a trial in Texas would not operate vexatiously on petitioner or impose needless hardship. The later trial on the merits confirmed that.

Although the burden was on movant to prove otherwise, as shown in our previous statement from the record made of the hearing on motion to transfer, any idea that the suit as filed in Texas as a matter of "forum shopping" has been dissipated. Aside from other valid reasons shown, such choice was finally made after respondents' attorneys determined from investigation that a trial and disposition in Texas could be secured without unreasonable or unnecessary delay, and that such was not true in the Southern District of California and the same conditions would

at' nd any appeal. Petitioner says there was no hurry, bu. respondent Dr. Edwin Janss, after attending the trial, is shown by the record to have died before the judgment could be entered. It was affirmatively shown that this Delaware corporation having its principal place of business in New York would be subjected to no unreasonable expense and that respondents tendered payment of the expenses of petitioner's only "key" witness, Metzler, and to cover the cost of copying.

It is said by petitioner that the Texas courts and the 5th Circuit are not familiar with California law, but, as is apparent in cases earlier cited, both the Texas courts' and the 5th Circuit's opinions are replete with references to California decisions, and vice versa. It has not been shown and cannot be seriously contended that the contract law of California is either unique or substantially different from the contract law in Texas and elsewhere. It is not asserted in the petition that the courts below in acting on the merits did not construe and interpret the contracts according to the California decisions on the construction and interpretation of a contract to pay money although the contention is made on the jurisdiction issue that under the authorities in the California cases such contracts also conferred rights upon promisees constituting an interest in land, which has been previously answered.

It is again emphasized that the defendant below was *not* the landowner.

Petitioner cites and relies on personal injury cases in which a defendant has been called upon to try a case far from the place of the tort. Petitioner declines

to acknowledge the obvious distinctions between such a case and an action based on a breach of written contract (noted in *Marks v. Fireman's Fund Ins. Co.*, 109 F. Supp. 800, 803 [S.D.N.Y., 1953]) which was to be tried by the court without a jury. Such a case might have been tried on depositions, but the record affirmatively shows that petitioner was not limited to depositions and that the only limitation on the number of witnesses imposed by the courts concerned expert testimony as to industry, custom and usage, and that such was imposed at petitioner's request over respondents' objection.

CONCLUSION

For the reasons advanced above, the petition for a writ of certiorari should be denied.

Respectively submitted,

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